A hundred years of demolition orders: a constitutional analysis

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Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

J Strydom, March 2012, Stellenbosch

Summary

Ownership, and especially the ownership of land, consists of rights as well as duties. The social responsibilities of the owner depend on the prevailing needs of the public (as expressed in legislation) and are subject to change. Section 25(1) of the Constitution impliedly recognises the social obligations of the property owner insofar as it confirms that ownership can be regulated by the state in the public interest. Section 25(1) also sets requirements for the interference with property rights and, in so doing, recognises that the social obligations of the property owner are not without boundaries.

In its landmark *FNB* decision the Constitutional Court gave content and structure to a section 25(1) challenge. The Constitutional Court held that deprivations will be arbitrary for purposes of section 25(1) if the law of general application does not provide sufficient reason for the deprivation or is procedurally unfair. The Constitutional Court elaborated that 'sufficient reason' had to be determined with reference to eight contextual factors which reflect the complexity of the relationships involved in the dispute.

With reference to section 25(1) and *FNB* this dissertation considers the constitutional implications of two types of statutory interference with the owner's right to use, enjoy and exploit his property. Firstly, the dissertation considers the owner's statutory duty in terms of the National Building Regulations and Building Standards Act 103 of 1977 to demolish unlawful and illegal building works in certain instances. Secondly, the dissertation considers the limitations imposed by the National Heritage Resources Act of 25 of 1999 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) on the owner's right to demolish historic or unlawfully occupied structures.

This dissertation argues that building and development controls, historic preservation laws and anti-eviction legislation are legitimate exercises of the state's police power. Generally, these statutory interferences with ownership will not amount to unconstitutional deprivation of property. Nevertheless, there are instances where regulatory laws cannot be applied inflexibly if doing so results in excessive interferences with property rights. The *FNB* substantive arbitrariness test indicates when the law

imposes disproportionate burdens on land owners. Furthermore, the non-arbitrariness tests shows when it might be necessary to mitigate disproportionate burdens, imposed in terms of otherwise legitimate regulatory laws, by way of German-style equalisation measures, which are comparable to the constitutional damages granted by South African courts.

This dissertation concludes that in the past century the South African legal system has progressed from the apartheid regime, which protected the rights and interests of the white minority, to a constitutional regime which safeguards the rights of all South Africans. There are two legal developments that may lead to positive change in the next century, namely active pursuance of the notion that ownership consists of rights and duties and the development of equalisation-style measures, incorporated into legislation, to alleviate excessive burdens imposed on property owners in the public interest.

Opsomming

Eiendomsreg, veral eiendomsreg op grond, bestaan uit regte sowel as pligte. Die sosiale verantwoordelikhede van die eienaar word bepaal deur die heersende behoeftes van die publiek (soos in wetgewing beliggaam) en is onderhewig aan verandering. Artikel 25(1) van die Grondwet erken implisiet die sosiale verpligtinge van die eienaar in soverre dit bevestig dat eiendomsreg nie 'n absolute reg is nie en dat dit deur die staat in die openbare belang gereguleer kan word. Artikel 25(1) koppel vereistes aan statutêre beperkings wat op die eienaar se regte geplaas kan word en erken daardeur dat die sosiale pligte van die eienaar nie onbegrens is nie.

In die invloedryke *FNB*-beslissing het die Grondwethof inhoud en struktuur aan grondwetlike analise ingevolge artikel 25(1) gegee. Die Grondwethof het bepaal dat 'n ontneming arbitrêr sal wees vir die doeleindes van artikel 25(1) as die algemeen geldende reg nie genoegsame rede vir die ontneming verskaf nie of as die ontnemingsproses prosedureel onbillik was. Die Grondwethof het uitgebrei dat 'genoegsame rede' bepaal moet word met verwysing na agt kontekstuele faktore wat die kompleksiteit van die verhoudinge wat in die geskil betrokke is, weerspieël.

Met verwysing na artikel 25(1) en *FNB* oorweeg hierdie proefskrif die grondwetlike implikasies van twee tipes statutêre beperkinge wat deur wetgewing op eienaars se regte geplaas word. Eerstens neem die proefskrif die eienaar se statutêre plig ingevolge die Wet op Nasionale Bouregulasies en Boustandaarde 103 van 1977 om onwettige en onregmatige geboue en bouwerke te sloop, in oënskou. Tweedens oorweeg die proefskrif die beperkinge ingevolge die Wet op Nasionale Erfenishulpbronne 25 van 1999 en die Wet op die Voorkoming van Onwettige Uitsettings en Onregmatige Besetting van Grond 19 van 1998 op die eienaar se reg om historiese en onregmatige bewoonde strukture te sloop.

Die proefskrif betoog dat bou- en ontwikkelingsbeheermaatreëls, historiese bewaringswette en uitsettingsvoorkomingswetgewing legitieme uitoefening van die staat se polisiëringsmag is. In die algemeen sal hierdie statutêre inmenging nie uitloop op ongrondwetlike ontneming van eiendom nie. Nietemin is daar gevalle waar die regulerende wette nie onbuigsaam toegepas kan word nie indien dit tot uitermatige

inmenging met die eienaar se regte lei. Die *FNB*-toets vir substantiewe arbitrêre ontneming dui aan wanneer ‘n wet ’n disproporsionele las op grondeienaars plaas. Verder wys die *FNB*-toets wanneer dit nodig mag wees om oneweredige laste, wat deur andersins regmatige regulerende wette opgelê is, te versag. Dit kan gedoen word deur middel van ’n statutêre maatreël, geskoei op Duitse voorbeeld, wat vergelykbaar is met grondwetlike skadevergoeding wat deur Suid-Afrikaanse howe toegeken is.

Hierdie proefskrif kom tot die gevolgtrekking dat die Suid-Afrikaanse regstelsel oor die afgelope eeu ontwikkel het van die apartheidsbestel, wat die regte en belange van die wit minderheid beskerm het, tot die huidige grondwetlike bestel wat die regte van alle Suid-Afrikaners beskerm. Twee ontwikkelinge kan tot positiewe verandering in die volgende eeu lei, naamlik aktiewe bevordering van die gedagte dat eiendomsreg uit regte en verpligtinge bestaan en ontwikkeling van statutêre maatreëls wat die uitermatige las wat in die openbare belang op eienaars geplaas word, te verlig.

Acknowledgements

Table of contents

Chapter 1:
A hundred years of demolition orders: a constitutional analysis

1 1 Introduction

Section 34(1) of the National Heritage Resources Act of 25 of 1999 (the Heritage Resources Act) provides that 'no person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority'.[1] In *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* (*Qualidental*)[2] the applicant (a land owner and developer of immovable property) applied to the heritage authority for a section 34(1) permit authorising the complete demolition of two structures, the villa and the annex, situated on its land. It was necessary to demolish these structures so that the applicant could proceed with its plans to construct two apartment blocks on the site. The heritage authority issued a permit for demolition of the annex, but not for the villa and it further imposed conditions pertaining to the demolition in terms of section 48(2) of the Act. These conditions stated, amongst other things, that building plans for new developments on the property had to be submitted to the heritage authority for approval. Furthermore, any new developments on the property had to be 'subsidiary to the main building [the villa] in terms of massing, siting, scale and location.'[3] The applicant subsequently submitted its development plans to the heritage authority for approval, but they were rejected on the ground that one of the apartment blocks would have obscured the main view of the villa. The heritage authority was also of the opinion that the new developments would not have blended in with the historic milieu created by the villa and other historic buildings in the vicinity. Undeterred, the applicant proceeded with its developments even though its building plans had not been approved by the local

[1] Section 34(1) of the National Heritage Resources Act 25 of 1999.

[2] 2007 (4) SA 26 (C) 27.

[3] 2007 (4) SA 26 (C) 28.

authority as required by section 4 of the National Building Standards and Building Regulations Act 103 of 1977 (the Building Standards Act).[4] When the heritage authority arrived on the site, it discovered that the annex had been demolished and that the applicant had excavated parts of the property. The applicant had laid concrete flooring and slabs and the principal external walls of the apartment blocks had already been built up to ground level. Moreover, the applicant had installed steel reinforcements so that it could proceed with the construction of concrete columns.[5] The heritage authority issued a stop works order, but this too was ignored by the applicant, who considered the order invalid. Consequently, the applicant approached the court for review and correction of the demolition permit. In particular, the applicant requested the court to delete the conditions from the demolition permit and it further sought the setting aside of the stop works order.[6]

The court purposively interpreted the provisions of the Heritage Resources Act and decided that heritage authorities have wide, rather than narrow, powers to pursue the goals set out in the Act. It was therefore within the heritage authority's power to impose conditions – designed to safeguard an historic structure (the villa) not yet formally protected under the Heritage Resources Act – when issuing a section 34(1) demolition permit for another building (the annex) situated on the property.[7] In reply, the applicant argued that the court's interpretation of the Heritage Resources Act would 'erode' its ownership entitlements. The court explained that ownership in South Africa could no longer be viewed as an absolute and inviolable right. In the constitutional era, ownership entitlements can only be exercised 'according to the social function of the law and in the interests of the community'.[8] Moreover, increasing emphasis has been placed on the notion that the owner has certain inherent responsibilities toward his community when exercising ownership entitlements. The court also underscored that it is necessary to balance and reconcile the protection of ownership, the effect that exercise of ownership

[4] 2007 (4) SA 26 (C) 29.

[5] 2007 (4) SA 26 (C) 29.

[6] 2007 (4) SA 26 (C) 27.

[7] 2007 (4) SA 26 (C) 36.

[8] 2007 (4) SA 26 (C) 37.

entitlements might have on third parties and the interests of the community.[9] In conclusion, the court held that the Heritage Resources Act formed part of the framework within which the right of ownership in South Africa should function.[10] As a result, the court dismissed the application.[11] The land owner was accordingly bound by the conditional demolition permit issued by the heritage authority. Furthermore, the local authority could apply to the court for a demolition order for the illegal building works constructed on the applicant's property.

It is evident that in *Qualidental* two types of statutory interference with property rights were at stake, namely the limitation imposed on the owner's right to demolish the villa and the owner's duty to demolish the illegal buildings once the local authority obtained a demolition order from the court. The case therefore shows that state regulation of the exercise of ownership entitlements could result in either preventing an owner from demolishing a building or forcing him to do so. *Qualidental* also shows that the limitation on property rights authorised by the regulation of demolition can be quite extensive. It is therefore necessary to determine, with reference to the precedent set in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (*FNB*),[12] when these types of interference with property rights are in conflict with section 25(1) of the Constitution. The point of departure is that the state has the power to regulate property rights in the public interest. There are, however, instances where regulatory laws impose disproportionate burdens on the land owner. Laws regulating the exercise of ownership entitlements are pervasive, yet comparatively little academic research has been done to explore the constitutional ramifications of these statutory measures. Furthermore, there has not been dedicated research on how the enforcement or non-enforcement of these laws affect the constitutional rights of, for instance, neighbouring land owners. This dissertation analyses the constitutional

[9] 2007 (4) SA 26 (C) 37.

[10] 2007 (4) SA 26 (C) 37.

[11] 2007 (4) SA 26 (C) 37. This decision was confirmed on appeal in *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2008 (3) SA 160 (SCA).

[12] 2002 (4) SA 768 (CC).

implications of three types of limitations on the exercise of ownership entitlements pertaining to demolition. Firstly, chapter 2 describes the limitations on the owner's right to demolish unlawfully occupied structures on his land, imposed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Secondly, chapter 3 explores the nature and extent of the land owner's duty to demolish unlawful or illegal structures on his land. Finally, chapter 4 analyses the limitations imposed by the Heritage Resources Act on the land owner's right to demolish historic structures on his land. With reference to the most prominent cases, the section below outlines the research field, research questions and hypotheses.

1 2 Research field, research questions and hypotheses

1 2 1 The regulation of demolition: three categories of limitations

1 2 1 1 Chapter 2: Unlawfully occupied buildings

Chapter 2 describes the nature and extent of statutory limitations on the land owner's right to demolish unlawfully occupied and decaying inner-city structures on his land, imposed by anti-eviction legislation. Specifically, PIE authorises a court to order the eviction of unlawful occupiers if it finds, after considering all the relevant circumstances, that it is just and equitable to grant the eviction order. PIE was enacted to give effect to the values set out in section 26(3) of the Constitution, which was drafted in direct response to the abuses of eviction and demolition orders during the apartheid era. It is therefore clear that eviction disputes in South Africa should be resolved in light of the relevant constitutional and historical context. In the watershed case, *Port Elizabeth Municipality v Various Occupiers* (*Port Elizabeth Municipality*)[13] the Constitutional Court emphasised that when it comes to eviction disputes 'the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law'.[14] The Constitution has created a new right that can conflict with ownership entitlements, namely the right not to be arbitrarily evicted from one's home.

[13] 2004 (12) BCLR 1268 (CC).

[14] 2004 (12) BCLR 1268 (CC) para 23.

In disputes of this kind, the function of the court is not to automatically prefer ownership above the interests of unlawful occupiers. Rather, it is expected of a court to:

> 'balance out and reconcile the opposed claims in as just a manner as possible taking into account all the interests involved and the specific factors relevant in each particular case'.[15]

The implication of *Port Elizabeth Municipality* is that there may be instances where the land owner will not obtain an eviction order. This can have far-reaching consequences for the land owner, since the continued unlawful occupation of land can, for example, affect the owner's plans to firstly, demolish the occupied structures and, secondly, to develop the property. In this chapter, the focus therefore falls on statutory restrictions that will prevent a land owner from demolishing unlawfully occupied and possibly dilapidated buildings on his land, purely because the granting of the demolition order is subject to the granting of an eviction order, which in turn is limited by anti-eviction legislation.

There is no clear indication of when the unlawful occupation of property will result in an unconstitutional interference with property rights in the form of preventing the owner from demolishing unwanted structures on his land. This dissertation draws from case law on eviction to delineate the instances when the continued unlawful occupation of property might disproportionately burden the land owner. Explained differently, this dissertation describes the instances where the continued unlawful occupation of land, and the subsequent limitation on the land owner's demolition rights, may amount to an arbitrary deprivation of property. Chapters 2 and 5 determine whether there are methods to protect the land owner's interests when the continued unlawful occupation of a building results in an excessive interference with his property rights. This chapter raises the hypothesis that, although land owners are generally not entitled to an immediate eviction order whenever their property becomes unlawfully occupied, there are instances where preventing them from terminating the unlawful occupation of their land and demolishing unlawfully occupied structures can result in an arbitrary

[15] 2004 (12) BCLR 1268 (CC) para 23.

deprivation of property. PIE does not cater for the protection of ownership entitlements in instances where it is neither just nor equitable to order the eviction of unlawful occupiers or where the courts are obliged, in terms of anti-eviction legislation, to allow the continued unlawful occupation of private land. It is accordingly necessary to develop South African law so that it can mitigate otherwise excessive interferences with property rights caused by lawful state action in the form of preventing a land owner, in terms of anti-eviction legislation, from demolishing unlawfully occupied structures on his land.

1 2 1 2 Chapter 3: Unlawful and illegal buildings

Van der Walt argues that a body of encroachment cases have created the impression that the courts are unwilling to demolish illegal[16] or unlawful[17] building works if the structures are valuable, or if demolition would cause undue hardship for the owners.[18] For example, in *Trustees of the Brian Lackey Trust v Annandale*,[19] the court explained that it has a natural aversion against the demolition of costly structures. Moreover, the demolition of an encroaching structure can in some instances lead to unjust results. A court thus has a wide and equitable discretion to order the payment of compensation instead of the removal.[20] However, case law has more recently confirmed the standing of neighbouring land owners, and voluntary associations acting on behalf of land

[16] Illegal buildings refer to buildings or building works erected in conflict with statutory requirements. Specifically, a building will be illegal and liable for demolition if it was constructed without approved building plans as required by section 4(1) of the Building Standards Act. Cases such as *High Dune House (Pty) Ltd v Ndlambe Municipality and others* [2007] ZAECHC 154 (29 June 2007) para 2 and *Searle v Mossel Bay Municipality and others* [2009] ZAWCHC 9 (12 February 2009) para 10 confirmed that a structure is also illegal if it was built in accordance with building plans that were set aside on review.

[17] A building is unlawful when its construction conflicts with the property rights held by other persons, such as the limited real rights held by neighbouring land owners. This dissertation specifically refers to case law where the court ordered the demolition of structures built in conflict with limited real rights created by restrictive conditions registered against the title deeds of properties in a neighbourhood.

[18] Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 34.

[19] 2004 (3) SA 281 (C).

[20] 2004 (3) SA 281 (C) para 38.

owners, to approach the court for relief when unlawful or illegal structures have been built in their neighbourhood.[21] In some instances, the courts elected to order the demolition of illegal and unlawful structures.[22] In so doing, the respective courts protected the various interests affected by unregulated development and building works.

In the series of *Van Rensburg*[23] cases, the demolition orders were granted for buildings that had been built in conflict with conditions of title. For example, in *Van Rensburg NO v Nelson Mandela Metropolitan Municipality*,[24] the court ordered the demolition of an additional storey of a garage and an entire double-storey building erected in conflict with conditions of title.[25] Similarly, in *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape, and others*,[26] the court ordered the setting aside of the minister's decision to remove conditions of title registered against the title deed of the third respondent's property. This meant that the nine apartments built by the third respondent were unlawful insofar as they conflicted with these conditions. The buildings were also illegal, since the building plans had been approved despite the existence of conflicting

[21] *BEF (Pty) Ltd v Cape Town Municipality and others* 1983 (2) SA 387 (C); *Bedfordview Town Council and Strydom R and another v Mansyn Seven (Pty) Ltd and others* 1989 (4) SA 599 (W*); Pick and Pay Stores Ltd and others v Teazers Comedy and Revue CC and others* 2000 (3) SA 645 (W); *PS Booksellers (Pty) Ltd and another v Harrison and others* 2008 (3) SA 633 (C) paras 16-20 and *Tergniet and Toekoms Action Group and 34 others v Outeniqua Kreosootpale (Pty) Ltd and others* [2009] ZAWCHC 6 (23 January 2009) para 22.

[22] *Standard Bank of South Africa Ltd v Swartland Municipality and others* [2010] ZAWCHC 103 (31 May 2010) *Van Rensburg NO v Nelson Mandela Metropolitan Municipality* 2008 (2) SA 8 (SE); *Van Rensburg NO and another v Equus Training and Consulting CC and another* [2009] ZAECPEHC 50 (25 September 2009); *Van Rensburg NO v Naidoo NO* [2010] ZASCA 68 (26 May 2010) and *Barnett and others v Minister of Land Affairs and others* 2007 (6) SA 313 (SCA).

[23] *Van Rensburg NO v Nelson Mandela Metropolitan Municipality* 2008 (2) SA 8 (SE) confirmed in *Van Rensburg NO v Naidoo NO* [2010] ZASCA 68 (26 May 2010). See further *Van Rensburg NO and another v Equus Training and Consulting CC and another* [2009] ZAECPEHC 50 (25 September 2009).

[24] 2008 (2) SA 8 (SE).

[25] 2008 (2) SA 8 (SE) paras 4 and 12.

[26] 2001 (4) SA 294 (C).

conditions of title.[27] Accordingly, neighbouring land owners could apply to have the unlawful and illegal buildings demolished. Collectively, these cases confirm that the efficiency of conditions of title as a planning tool is dependent on adequate enforcement mechanisms such as the demolition order. Moreover, these cases show that the courts are prepared to order the demolition of unlawful structures as a measure to safeguard both the limited real rights *sui generis*[28] held by neighbouring land owners and the public interest in safe and healthy urban areas.

The courts have adopted a similar attitude in instances where structures were built without approved building plans. In *Barnett and others v Minister of Land Affairs and others* (*Barnett*),[29] the Supreme Court of Appeal upheld a demolition order in respect of holiday cottages erected without building plans and violated the provisions of an environmental conservation decree. The court found that the construction of the cottages caused irreparable harm to the already fragile environment. Demolition and the removal of the illegal structures was the only way in which the area could to some extent be rehabilitated.[30] Decisions such as *Barnett* show that the courts will not shy

[27] Section 7 of the Building Standards Act prohibits the approval of a building plan if it will trigger one of the disqualifying factors listed in either section 7(1)(b)(i) or (ii) of the Act. Section 7(1)(b)(i) of Act 103 of 1977, for example, proscribes the approval of a plans if it does not comply with the requirements of the Act or any other applicable law. *Walele v The City of Cape Town and others* 2008 (11) BCLR 1067 (CC) para 56 confirmed that if building plans are approved despite the existence of a disqualifying factor, 'the process becomes invalid and can be set aside on that ground'. Case law indicates that building plans will be set aside on review if they were, for instance, approved in conflict with the provisions of the Building Standards Act, conditions of title, zoning schemes and environmental conservation laws.

[28] See in this regard Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 153 and to the same effect Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 288.

[29] 2007 (6) SA 313 (SCA).

[30] 2007 (6) SA 313 (SCA) at 315 and 326. Correspondingly, in *Standard Bank of South Africa Ltd v Swartland Municipality and others* [2010] ZAWCHC 103 (31 May 2010) the court had to determine whether it could set aside a demolition order for an illegal structure at the instance of the bank that held a security interest in the property. The court decided that the third respondent had acted contrary to public policy when he erected an illegal structure. As a result, the court held that it could not condone the actions of the third respondent and it refused to set aside the demolition order.

away from granting a demolition order, especially in instances where the land owner constructed a building in blatant disregard of the law.[31] Furthermore, when a court orders the demolition of an illegal structure, it upholds the principle of legality and it protects the public interest in, for instance, the conservation of the environment and the orderly and sustainable development of urban areas.

Finally, there are instances where buildings will be demolished if they were built in accordance with building plans set aside on review. *Searle v Mossel Bay Municipality and others*[32] made it explicit that the local authority will be forced to obtain a demolition order if the building plans are set aside on review and the 'resultant position cannot be lawfully remedied.'[33] The court explained that:

> '[t]he primacy in our constitutional order of the principle of legality makes it unlikely that the building owner's convenience will prevail if the structure is in fact irremediably unlawful'.[34]

Crucially, *Camps Bay Ratepayers and Resident's Association v Harrison* (*Camps Bay*)[35] shows that there are instances where the courts are unwilling to order the demolition of illegal, or partially illegal, buildings or building works. In this decision the Supreme Court of Appeal relied on a range of factors, including the impact of the *Oudekraal*[36] delay principle, to find that it would not set aside the first respondent's building plan even though it was in conflict with certain provisions of the zoning scheme. The implication was that the applicants could not apply to have the respondent's partially illegal building

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[31] The same line of reasoning was adopted in *City of Tshwane v Ghani* 2009 (5) SA 563 (T) at 567, where the court held that it was obliged to 'set its face sternly against actions that are as blatantly and brazenly in conflict with the law as those the respondents have committed'. In this case the respondent had constructed a retail store without approved building plans on land which he did not own. The court interdicted the respondent from taking occupation of the property and prohibited him from trading from the premises.

[32] [2009] ZAWCHC 9 (12 February 2009) para 10.

[33] [2009] ZAWCHC 9 (12 February 2009) para 10.

[34] [2009] ZAWCHC 9 (12 February 2009) para 10.

[35] [2010] ZASCA 3 (17 February 2010).

[36] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA).

demolished. *Camps Bay* suggests that that there are circumstances where regulatory laws cannot be applied inflexibly because it will lead to unjust and inequitable results.

Demolition is a practical solution in instances where the property rights of others (such as the limited real righs *sui generis* created by conditions of title) cannot be properly vindicated by compensation. Likewise, demolition is an efficient way to enforce compliance with, for example, the provisions of the Building Standards Act. To date, a land owner has not yet challenged the constitutionality of a demolition order granted with respect to unlawful or illegal buildings situated on his property. This raises the question whether there are instances where it would be unconstitutional to compel a land owner to demolish the illegal or unlawful structures that he had built on his land. The central hypothesis in chapter 3 is that it is within the state's police power to regulate building and development on private land, if necessary by ordering the demolition of illegal and unlawful buildings. Likewise, neighbouring land owners, and specifically the holders of limited real rights, generally have the right to insist that local authorities enforce compliance with the law by demolishing irremediably illegal or unlawful structures situated in their neighbourhood. However, as the *Camps Bay* decision indicates, there may be instances where the demolition of an unlawful or illegal structure will impose a disproportionate burden on the offending land owner. Insisting on the demolition of technically illegal or unlawful buildings might, in those instances, result in an arbitrary deprivation of the land owner's property, just as not ordering or effecting the demolition of illegal or unlawful buildings would, in most instances, establish arbitrary deprivation of the property rights of neighbours and others who hold limited real rights or other, similar interests that are offended by the building.

1 2 1 3 Chapter 4: Historic buildings

As explained in section 1 1 above, section 34(1) of the Heritage Resources Act proscribes the demolition of any structure that is older than 60 years without a demolition permit awarded by the heritage resources authority. A heritage authority must consider placing the structure under formal protection within three months of

denying the application for a demolition permit.[37] Once a building is formally protected 'no one may destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site' without a permit issued by the relevant heritage authority.[38] It is also within the heritage authority's power to issue a compulsory repair order in circumstances where the land owner neglects to maintain a heritage resource placed under formal protection in terms of the Act.[39]

Case law has indicated that the courts enforce strict compliance with section 34(1) of the Heritage Resources Act.[40] *Qualidental*[41] illustrated that the courts afford wide rather than narrow powers to the heritage authority to realise the goals set out in the Act.[42] Case law also shows that unless there is some procedural irregularity, the courts are generally reluctant to hold that the heritage authority's decision to refuse a section 34(1) demolition permit is wrong.[43] For instance, in *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape, and others*, the court determined that it would not set aside the heritage authority's decision to deny a demolition permit for a simple wood and iron structure, which – in the view of the court – could hardly be described as a 'monument to our own forebears' architectural achievement'.[44] The court

[37] Section 34(2) of the National Heritage Resources Act 25 of 1999.

[38] Section 27(18) of Act 25 of 1999. Section 27, a formal protection measure, regulates the declaration and protection of provincial or national heritage sites. The other formal protection measures are contained in sections 28-32 of the Act and they place restrictions similar to those listed in section 27(18) on the exercise of ownership entitlements.

[39] Section 45 of Act 25 of 1999.

[40] *Provincial Heritage Resources Authority, Eastern Cape v Gordon* 2005 (2) SA 283 (E); *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C); *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2008 (3) SA 160 (SCA) and *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape, and others* 2009 (5) SA 512 (ECG).

[41] *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) and *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2008 (3) SA 160 (SCA).

[42] *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) 27.

[43] In *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape, and others* 2009 (5) SA 512 (ECG).

[44] 2009 (5) SA 512 (ECG) para 2.

explained that it was required to respect the findings of a decision-making body, particularly where the decision 'appears to conform to the overall scheme of the legislation.'[45] As a result, the land owner had to drastically alter her plans to build a guesthouse on the plot where the historic structure was situated. Both *Qualidental* and *Corrans* illustrate the extent of the limitations that heritage preservation laws, such as the Heritage Resources Act, can impose on the land owner. In the South African context these limitations have not yet been subjected to constitutional scrutiny. It is accordingly unclear whether the Heritage Resources Act has the potential to authorise an arbitrary deprivation of property in the form of denying a land owner the right to demolish structures on his land.

The constitutionality of the limitation placed on the land owner's right to demolish an historic structure has been considered by the Supreme Court of the United States of America (the Supreme Court) as well as the German Federal Constitutional Court. In both jurisdictions the respective courts confirmed the general constitutional validity of heritage preservation laws. In particular, they held that a limitation on an owner's right to demolish an historic structure is not unconstitutional. There are, however, instances where such a limitation can result in an unconstitutional interference with property rights. Interestingly, both jurisdictions incorporate mechanisms to alleviate burdens that are imposed on the land owner by historic preservation laws. These jurisdictions serve as valuable comparative sources since they provide an indication of when the limitations imposed on the land owner's right to demolish historic structures may be unconstitutional on the grounds of section 25(1). Furthermore, these jurisdictions show how to mitigate potentially disproportionate burdens imposed by the Heritage Resources Act. Accordingly, Chapter 4 determines, with reference to case law emanating from South Africa, Germany and the United States of America (US), when the limitation on the land owner's right to demolish historic structures might amount to an arbitrary deprivation of property. The central hypothesis of this chapter is that historic preservation forms part of the state's police power. However, the limitations imposed on the land owners by historic preservation statutes can be far-reaching. It is therefore

[45] 2009 (5) SA 512 (ECG) para 21.

necessary to determine when these limitations would go too far and amount to arbitrary deprivation of property. Moreover, it might be useful to explore the operation of German-style equalisation measures in the South African context to mitigate the otherwise excessive burdens imposed on land owners by legislation such as the Heritage Resources Act. On the basis of the comparative material, this chapter analyses the conditions under which denial of a demolition order in terms of historic preservation legislation might impose an excessive burden upon the owner and thus constitute arbitrary deprivation of property, and also whether the imposition of burdens in terms of this legislation may be alleviated by legislative and other measures that could prevent the deprivation from being excessive and thus arbitrary.

1 2 2 Chapter 5: The constitutional context

Section 25(1) of the Constitution provides that:

> '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.

In the authoritative *FNB* decision the Constitutional Court formulated a methodology in terms of which all constitutional property challenges should be assessed.[46] The court declared that a deprivation will be 'arbitrary' if the law of general application provides insufficient reason for the deprivation or is procedurally unfair.[47] 'Sufficient reason', the Constitutional Court explained, has to be established with reference to eight contextual factors that direct a court to conduct an in-depth analysis of, amongst other things, the relationships between the affected property owner, the extent of the interference with property rights and the purpose of the deprivation.[48] The *FNB* methodology and its substantive arbitrariness test is therefore the point of departure for conducting a constitutional property enquiry.

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[46] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

[47] 2002 (4) SA 768 (CC) para 100.

[48] 2002 (4) SA 768 (CC) para 100.

In his most recent work,[49] Van der Walt emphasises two facets of a constitutional property challenge that has largely gone unnoticed. Firstly, Van der Walt notes that generally the courts and legal practitioners have failed to properly consider the 'law of general application' component of a section 25(1) enquiry. More specifically, when faced with a constitutional property dispute, the courts neglect to enquire whether the specific interference with property rights is actually authorised by the law of general application.[50] Van der Walt explains that if a court establishes that the interference with property rights is not authorised by the law of general application, the deprivation will be unlawful.[51] However, a court can proceed with the substantive arbitrariness enquiry if the law of general application in fact authorises the deprivation in question. The implication is that many deprivations will already fall foul of this important requirement. As a result, it will be unnecessary in those cases to determine whether the deprivation is substantively arbitrary and therefore unconstitutional.

Secondly, Van der Walt reasons that too little consideration is given to the 'procedural fairness' aspect of the *FNB* definition of 'arbitrary'. Some Constitutional Court decisions have merely touched on the issue,[52] while others have only superficially engaged with this concept.[53] Van der Walt argues that from *FNB* one can deduce that, in addition to substantive arbitrariness, procedural fairness is a separate ground on which a deprivation can be arbitrary.[54] He further explains that to fully comprehend the meaning of this concept, it is necessary to distinguish between deprivations caused by legislation and deprivations caused by administrative action.[55] The full extent of Van der

[49] Van der Walt AJ *Constitutional property law* 3 ed (2011)

[50] Van der Walt AJ *Constitutional property law* 3 ed (2011) 235-236.

[51] Van der Walt AJ *Constitutional property law* 3 ed (2011) 236.

[52] *Mkontwana v Nelson Mandela Metropolitan Municipality and another; Bisset and others v Buffalo City Municipality and others; Transfer Rights Action Campaign and others v MEC, Local Government and Housing, Gauteng, and others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) paras 1-2 and 65-67.

[53] *Reflect-All 1025 CC v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC).

[54] Van der Walt AJ *Constitutional property law* 3 ed (2011) 264-265.

[55] Van der Walt AJ *Constitutional property law* 3 ed (2011) 266-267.

Walt's argument is set out in chapter 5. It suffices to say that if a deprivation is caused by administrative action, 'procedural fairness' must be assessed with reference to the principles that apply in administrative law under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[56] A deprivation caused by administrative action does not raise a section 25(1) issue. Van der Walt explains that in this instance, the administrative action should be challenged and the procedural fairness issue decided on the basis of PAJA.[57] By contrast, if legislation imposes a deprivation directly, without administrative action, and in a procedurally unfair manner, the deprivation will also be arbitrary, but then PAJA does not apply. As a result, the legislation can then be challenged on the basis of section 25(1) insofar as the legislation permits arbitrary deprivation of property.[58] However, the land owner may have two remedies if the deprivation – caused by administrative action – is also substantively arbitrary.[59] Van der Walt suggests that a PAJA remedy is preferable if the deprivation is substantively arbitrary because of a procedural irregularity or the manner in which the administrative discretion was exercised. Section 25(1) is the more suitable basis for litigation if the deprivation is substantively arbitrary because of the impact that it has on the land owner.[60]

Against this background, chapter 5 analyses the constitutional implications of the regulation of demolition in the context of building and development controls, historic preservation statutes and anti-eviction legislation. In particular, chapter 5 establishes whether land owners are deprived of property when they are compelled to demolish illegal and unlawful structures. Furthermore, chapter 5 analyses the nature of the deprivations imposed on neighbouring land owners when a local authority fails to demolish illegal or unlawful buildings. With reference to historic preservation and unlawfully occupied buildings, chapter 5 describes the nature of the deprivations imposed on land owners and other property rights holders by the regulatory denial of the right to demolish certain structures.

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[56] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267.

[57] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267.

[58] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267.

[59] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267.

[60] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267.

The central hypothesis of this chapter is that the *FNB* substantive arbitrariness test enables a court to ascertain when a limitation on the exercise of ownership entitlements amounts to an arbitrary deprivation of property. This test specifically requires of a court to firstly consider the interaction between the relationships involved in the dispute and secondly to balance and reconcile opposing interests. In so doing, the court can ascertain when a statutory regulation goes too far in its interference with ownership entitlements. Furthermore, the *FNB* non-arbitrariness test shows when it might be necessary to mitigate the effect of potentially arbitrary deprivations of property by way of an equalisation measure.

1 2 3 Chapter 6: The social obligation of the land owner

Even before the coming into operation of the Constitution, South African authors have argued that ownership, and especially the ownership of land, consists of rights as well as duties.[61] The social responsibilities of the owner are conceptualised according to the prevailing needs of the public and they are subject to change as society evolves. Some of these duties are defined in the common law, while others are circumscribed in legislation.[62] The notion of the social responsibility of the land owner is arguably also rooted in section 25(1) of the Constitution, which has two broad functions. Firstly, it confirms that ownership is not an inviolable right and it can be regulated by the state in the public interest.[63] This means that ownership cannot be classified as an 'absolute and individualistic right without any qualification attached thereto'.[64] It is this aspect of

[61] Lewis C 'The modern concept of ownership of land' 1985 *Acta Juridica* 241-266 at 243-244; 248-249 and 260-262, Visser DP 'The absoluteness of ownership: the South African common law perspective' 1985 *Acta Juridica* 39-52 at 43-48 and Van der Walt AJ 'The effect of environmental measures on the concept of landownership' (1987) 104 *SALJ* 469-479 at 476-479.

[62] Lewis C 'The modern concept of ownership of land' 1985 *Acta Juridica* 241-266.

[63] Van der Walt AJ *Constitutional property law* (2005) 13.

[64] *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) 37. Davies J reasoned that 'this individualistic concept of ownership is ostensibly found in the fact that the owner's rights is enforceable against the whole world and therefore includes exclusive entitlements in respect of the disposition and enjoyment of such property.'

section 25(1) where one can read in the social responsibility component of ownership. Secondly, section 25(1) ensures that regulatory limitations on property rights are not arbitrarily or unfairly enforced, since it prescribes that these limitations should meet certain constitutional requirements.[65] This implies that the obligations imposed on ownership by legislation are not without boundaries. The limitations imposed on an owner's right to use, enjoy and exploit his property will be constitutionally valid, provided they are imposed in terms of law of general application, for a legitimate public purpose, and they are not arbitrary.

Like the South African authors, Alexander holds the view that property owners have certain social obligations.[66] Alexander has formulated what he refers to as the social obligation norm to explain why in the US certain limitations are imposed on the exercise of ownership entitlements. Alexander's social obligation norm is useful since it can also provide a theoretical justification for the regulation of demolition in the context of illegal and unlawful buildings, historic preservation and unlawfully occupied inner-city structures. Importantly, section 25(1), and in particular the *FNB* substantive arbitrariness enquiry, indicates when legislative or regulatory limitations imposed in the name of the social obligation of the land owner amount to an unconstitutional interference with property rights. Furthermore, the analysis of the non-arbitrariness test shows when it would be necessary and possible to mitigate otherwise disproportionate burdens imposed on land owners by lawful state action.

The central hypothesis of this chapter is that the social obligation provides a theoretical framework in terms of which one can assess the outcome of an *FNB* substantive arbitrariness analysis. More specifically, the social obligation norm explains why, on the one hand, certain interferences with property rights will not amount to an arbitrary deprivation of property. This theory also explains why, on the other hand, some regulatory interference with property rights amounts to disproportionate burdens imposed on land owners in conflict with section 25(1). Finally, the social obligation norm

[65] Van der Walt AJ *Constitutional property law* (2005) 13.

[66] See in this regard Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) and Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820.

provides a theoretical basis for understanding why, in some instances, it may be necessary to protect owners from excessive interference with property rights by way of an equalisation measure, instead of simply declaring the authorising law invalid and unconstitutional.

Broadly speaking, the research question investigated in this dissertation and the hypotheses that structure the analysis can be summarised as follows: section 25(1) of the Constitution authorises the state to regulate the exercise of ownership entitlements in the public interest. This aspect of section 25(1) impliedly recognises the responsibilities that accompany the ownership of property, and especially the ownership of land. These responsibilities are often circumscribed in legislation, such as building and development controls, anti-eviction laws and historic preservation statutes. Section 25(1) also confirms that the responsibilities of the land owner are not unconditional and it prescribes two standards (law of general application and non-arbitrariness) against which regulatory interferences with property rights should be tested. Generally the regulatory control of demolition will meet the two requirements set in section 25(1). However, there may be instances where the limitation on the owner's right to demolish certain structures may result in an arbitrary deprivation of property. Likewise, there may be instances where the owner's duty to demolish illegal or unlawful buildings may amount to an arbitrary deprivation of property. The *FNB* substantive arbitrariness test enables a court to establish when the regulation of demolition will amount to an excessive interference with property rights. The non-arbitrariness test will also show when a regulatory interference with property rights will be arbitrary but for an equalisation measure that mitigates the disproportionate burden imposed on the land owner in the public interest.

1 3 Qualifications

The title of this dissertation, *A hundred years of demolition: a constitutional analysis*, was selected as nearly a century has passed since the first South African legislative measures authorised (albeit indirectly) the demolition of structures, especially residential

structures, along racial lines.[67] During the past 100 years, South African law has undergone many changes impacting on demolition. These changes include the enactment of apartheid legislation, which expressly authorised draconian demolitions and evictions to further the political ideals of the minority government and later, during the constitutional era, a new body of legislation rooted in constitutional values such as equality and non-discrimination, justice and human dignity. The Constitution of the Republic of South Africa, 1996 (the Constitution) expressly incorporates two provisions, section 25(1) and section 26(3), that have a direct bearing on demolition disputes. It is therefore necessary to analyse demolition in light of the changes of the past 100 years.

Chapter 4 incorporates a comparative law analysis to determine the circumstances when historic preservation laws disproportionately burden the land owner. As explained in section *1 2 1 3*, South African case law has not yet indicated when the land owner's preservation duties under historic preservation laws might amount to an unconstitutional interference with property rights. This issue has been addressed by both the German Federal Constitutional Court and the US Supreme Court. It is thus beneficial to analyse these decisions to determine to what extent historic preservation statutes may lawfully interfere with property rights. Both jurisdictions also incorporate measures (equalisation measures)[68] that alleviate what might otherwise have been excessive burdens imposed on land owners by historic preservation statutes. Similar measures might, in their robust form, exist in South African law. These foreign jurisdictions shows that when assessing the impact of a deprivation for purposes of section 25(1), South African courts should consider whether there are equalisation measures that would mitigate potentially arbitrary deprivations of property.

Historic preservation statutes are quite common worldwide and they generally operate in more or less the same way. It is therefore unproblematic to compare foreign historic preservation cases with the South African legal position as set out in case law.

[67] The Black Land Act 27 of 1913 for example proclaimed certain areas for the exclusive occupation of black South Africans. It is likely that many dwellings, occupied by black South Africans, were demolished if they were located in 'white-only' areas.

[68] See in this regard Van der Walt AJ *Constitutional property law* 3 ed (2011) 277-282 and 366-367.

Another consideration is that although historic preservation laws are universal, there are only a few authoritative decisions on the topic, two of those being the US and German cases discussed in chapter 4. While these considerations render the comparative analysis on chapter 4 useful, they should not be seen as an effort to cast the dissertation in a general comparative mould.

Chapter 3 (unlawful and illegal buildings) and chapter 2 (unlawfully occupied structures) do not incorporate a comparative law component. The reason for this is that building and development laws operate in divergent ways in different jurisdictions and are often enforced on the municipal level. It would have been impractical (and probably not very useful) to research the intricacies of these laws as they operate in their respective legal systems. Moreover, chapter 2 assesses the issue of unlawfully occupied inner-city structures within the apartheid and constitutional context. Eviction disputes in South Africa are quite unique, given this rich background. Comparative research in this field would not necessarily have enriched the discussion of the limitations imposed on the owner's right to demolish unlawfully occupied structures.

Finally, this dissertation refers to 'demolition' or 'partial demolition' to describe the complete or partial destruction of buildings or building works.[69] The word 'preservation', in the context of chapter 4, indicates that a person cannot alter, destroy, or change in any way a building without the permit issued by the heritage authority. It further means that the land owner will have to bear the financial burden of keeping an historic building in good repair.

[69] The term 'buildings' refers to larger structures such houses, apartments or shopping centres while 'building works' refers to smaller structures such as balconies or walls.

Chapter 2:
The right to demolish unlawfully occupied buildings

2 1 Introduction

The right to destroy or to demolish is one of the entitlements that an owner enjoys in relation to his property.[1] Like other ownership entitlements, the right to demolish buildings is not unfettered, and in a modern society this right is regulated by legislation in the public interest. Historic preservation laws, for example, impose extensive limitations on the owner's right to demolish historic or culturally valuable buildings.[2] In the South African context, the regulation of an owner's demolition rights did not always have such a seemingly neutral function. During the apartheid era property owners' private law demolition powers were exploited by the then government to further its ideal of a racially segregated society. This was mainly done through legislation that compelled property owners to demolish structures on their property, if they were considered unhealthy and unsafe, or because they did not comply with building regulations. Similarly, local authorities were granted extensive powers to demolish unsafe, unhealthy or illegal structures, usually occupied by black citizens.

Legislation such as the Prevention of Illegal Squatting Act 52 of 1951 (PISA), enabled the forced removal of poor black South Africans who often dwelled in structures that did not comply with the applicable regulations. Together, the private property owners' and local authorities' statutorily inflated eviction and demolition powers further entrenched the socio-economic divide between mostly affluent white and mostly marginalised[3] black people.

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[1] Van der Merwe CG *Sakereg* 2 ed (1989) 173. Lewis C 'The modern concept of ownership of land' 1985 *Acta Juridica* 241-266 at 250 explains that whether an owner actually has the right to destroy property depends on the nature of the object owned.

[2] The impact of historic preservation laws on an owner's right to demolish historic buildings is discussed in chapter 4.

[3] The term 'marginalised' is derived from Van der Walt AJ *Property in the margins* (2009).

After the demise of apartheid, the new constitutional era brought with it a shift in the treatment of unlawful occupiers. Specifically, section 26(3) was included in the Constitution in a response to the arbitrary nature of apartheid evictions and demolitions. Section 26(3) of the Constitution recognises the principle of eviction, but it restricts the manner in which unlawful occupiers are evicted. Section 26(3) also explicitly prohibits the arbitrary demolition of a person's home. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was promulgated to give effect to the rights enshrined in section 26(3) of the Constitution. This Act indirectly impinges on the owner's right to demolish an unlawfully occupied building as it limits his right to evict unlawful occupiers from that building. Such a limitation can have far-reaching consequences as it can, for instance, interfere with the owner's plans to use or to develop the property. Owners would also have to maintain that property so that it complies with the health and safety standards set in legislation. Essentially, this means the owner would have to incur what could be considerable expenses in relation to a building that he may be unable to use for any purpose, including to generate income from it. It is further possible that the value of the property could decline, perhaps drastically, because it is unlawfully occupied. This in turn could impact on the possibility of selling the property.

This chapter describes, primarily with reference to case law, how apartheid-era legislation incorporated rigorous demolition powers to promote race-based spatial segregation, especially in urban areas. The second part of the chapter contrasts this abuse of the power to demolish with post-apartheid case law, to show how property owners' and local authorities' demolition powers have been drastically limited in the constitutional era.

2 2 The abuse of demolition powers in the pre-constitutional era

2 2 1 Introduction

Lewis explains that South African laws have designated separate living areas for blacks since 1855.[4] The Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936 are some of the more well-known laws that proclaimed separate reserves for the exclusive occupation of black persons in rural areas.[5] These acts further prohibited black persons from acquiring land that fell outside the designated areas. Olivier explains that the Black Land Act and later the Development Trust and Land Act were enacted to ensure the territorial segregation of black and white South Africans, and to entrench the notion that black people were only temporary residents in areas situated outside the reserves.[6] Similar measures were introduced in urban areas, first by the Native (Urban Areas) Act 21 of 1923, and later by the Black (Urban Areas) Consolidation Act 25 of 1945. However, it was only after 1948, with the coming into power of the National Party government, that a formal policy of apartheid was adopted. This policy envisaged, amongst other things, the creation of separate reserves or independently governed homelands where black citizens were expected to reside permanently.[7] The apartheid government pursued this vision by, amongst other things, relocating large groups of the black population to the designated areas. It is estimated that during 1960-1983

[4] Lewis C 'The modern concept of ownership of land' 1985 *Acta Juridica* 241-266 at 261. Lewis specifically refers to laws that were in operation in the Transvaal in 1855 and laws that were in operation in Natal in 1895.

[5] For an explanation of the purposes of the Act, refer to Davenport THR 'Some reflections on the history of land tenure in South Africa, seen in light of attempts by the state to impose political and economic control' 1985 *Acta Juridica* 53-76 at 61-62.

[6] Olivier N 'Urbanisation: policy/strategy with particular reference to urbanisation and the law' (1988) 53 *Koers* 580-590 at 588-589. See further O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 363-364.

[7] Albertyn C 'Forced removals and the law: the *Magopa* case' (1986) 2 *SAJHR* 91-99 at 92 explains that 87% of South Africa (which included the industrial areas and major cities) was inhabited by white, Asian and coloured people while blacks people (who comprised of 73% of the population) were restricted to 13% of the land.

approximately 3,5 million people were forcibly removed to areas demarcated as homelands.[8]

Black urban South Africans were treated as temporary visitors in the white areas, and their presence was only tolerated insofar as they provided cheap labour to predominantly white households and white-owned enterprises. In its 1948 election manifesto, the National Party accused the Smuts government of being indifferent to the threats posed to the white population by the mixed circumstances in unprotected suburbs, on buses, trains, resorts and even universities. It further accused the Smuts government of being unresponsive to the overflowing source of crime, which in their opinion was caused by the influx of 'natives' into the cities. The National Party pledged that it would protect the European character of South African cities and, accordingly, a stringent influx control policy was implemented when it came into power.[9] Influx control was aimed at regulating the movements of black citizens to and from urban areas.[10] Various methods were employed to manage the influx of black persons into cities, including the creation of the so called TBVC states,[11] pass laws, the regulation of migrant labour forces[12] and the National Party government's failure to provide sufficient

[8] Albertyn C 'Forced removals and the law: the *Magopa* case' (1986) 2 *SAJHR* 91-99 at 92.

[9] O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 367.

[10] In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2009 (9) BCLR 847 (CC) para 192, Ngcobo J sketches a brief, but comprehensive history of the operation of influx control measures in especially the Western Cape. He explains that in the Western Cape preference was given to coloured labourers, which made it even more difficult for black people to reside in the city.

[11]Transkei, Boputhatswana, Venda and Ciskei. Budlender G 'Incorporation and exclusion: recent developments in labour law and influx control' 1985 (1) *SAJHR* 3-9 at 4 explains that these four states were known as the independent homelands. The so-called TBVC states were granted constitutional independence by the following statutes: Status of Transkei Act 100 of 1976; Status of Bophuthatswana Act 89 of 1977; Status of Venda Act 107 of 1979 and Status of Ciskei Act 110 of 1981.

[12] For a detailed account of how these measures collectively regulated the influx of black people to urban areas refer to Schoombee H and Davis D 'Abolishing influx control – fundamental or cosmetic change?' (1986) 2 *SAJHR* 208-219.

housing for black citizens.[13] Legislation such as the Prevention of Illegal Squatting Act 52 of 1951 (PISA); the Slums Act 53 of 1934 (the Slums Act) and the Groups Areas Act 40 of 1950 were also employed to regulate the influx of black people to urban areas. This policy remained in place for almost four decades.

However, during the 1980s the government realised that its influx control measures were unsuccessful.[14] The apartheid government subsequently promulgated the Abolition of Influx Control Act 68 of 1986, indicating its acceptance of the fact that black citizens would permanently be present in urban areas. Furthermore, the government replaced its influx control policy with an orderly urbanisation policy, which it maintained through the use of existing legislative instruments such as the Group Areas

[13] Schoombee H and Davis D 'Abolishing influx control – fundamental or cosmetic change?' (1986) 2 *SAJHR* 208-219 at 211 explain that severe housing shortages in areas that were set aside for occupation by black or coloured persons, served as a deterrent for those that wanted to move from rural to urban areas. They provide the example of Cape Town, where from 1972-1981 the government failed to build any form of housing for African citizens. The housing shortage in Cape Town was exacerbated by the destruction of squatter villages in the Crossroads area. O' Regan C 'No more forced removals? A historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 370 estimates that in 1975 about a thousand squatters in the Cape Town area were prosecuted for the illegal occupation of land. Van der Vyver JD 'Qu'ils mangent de la brioche!' (1981) 98 *SALJ* 135-148 at 142 explains that housing shortages in urban group areas (designated for occupation by Indian, coloured or black persons) led to violations of the Groups Areas Act 40 of 1950, which in turn resulted in forced removals and criminal prosecutions.

[14] O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 374.

Act,[15] PISA as amended and the Slums Act.[16] This new urbanisation policy was designed to enable the apartheid government, by way of legislation to control where,

[15] Schoombee JT 'Group Areas legislation - the political control of ownership and occupation of land' (1985) *Acta Juridica* 77-107 at 99. The Group Areas Act facilitated on a national scale the creation of group areas that were set aside to be exclusively owned or occupied by members of a certain race group. It is evident that the most affluent and wealthy areas were set aside for ownership and occupation by white citizens. The areas set aside for occupation by coloured, Indian and black citizens were often marked by acute housing shortages, little or no amenities and slum-like circumstances. Established group areas were often re-allocated for use and occupation by another race group. Schoombee provides the example of District Six in Cape Town, which was occupied by approximately 30 000 coloured persons when it was designated as a white area. The original occupants of District Six were forcibly removed and their homes were demolished, to make way for the new white inhabitants. He explains that the implementation of the Groups Areas Act contributed to the housing shortage since thousands of homes – and often entire neighbourhoods – were demolished in the creation and re-allocation of group areas. In 1977 alone, about 12104 houses were demolished in the course of establishing group areas. *Lockhat and other v Minister of the Interior* 1960 (3) SA 765 (D) 786C-E is one of the most infamous cases decided under the Groups Areas Act. In this case Henochsberg J attempted to circumvent the consequences of the Act, by stating that the power to discriminate against persons had to be either expressly or impliedly authorised in the Act. The court held that it could not find express or implied authority to discriminate in the Act, and that the power to establish group areas had to be exercised in a manner that would not result in the considerable unequal treatment of individual race groups. This finding was overruled in *Lockhat and other v Minister of the Interior* 1961 (2) SA 587 (A) 602D-F, where the Appellate Division explained that the colossal experiment that constituted apartheid was far more important than the hardships endured by citizens under the regime. See further *S v Adams; S v Werner* 1981 (1) SA 187 (A), where the court expressed the sentiment that persons who were unable to find decent accommodation in their group area could always return to wherever they had come from. Fortunately, the state was not always triumphant in group areas disputes. In *S v Govender* 1986 (3) SA 969 (T) 971B-972C, the court held that the Act conferred a wide discretion (which had to be used with circumspection) on a court to order the eviction of the appellant. An eviction order could only be granted if the court was expressly requested to do so, and only after relevant circumstances had been taken into account. Accordingly, the eviction order was not granted.

[16] Section 2 2 3 below briefly refers to those provisions of the Slums Act 53 of 1934, as amended, which were employed to further the apartheid ideal of a racially segregated society.

and how urban black South Africans lived.[17] It has been argued by academic commentators that collectively these acts continued to fulfil, albeit to a lesser extent, influx control functions because they criminalised the occupation and ownership of land in certain instances.[18] Despite these measures, persons still flocked to the cities in search of employment and a better life. Urban areas were overcrowded and, as the demand for housing far exceeded the housing supply, informal settlements continued to grow. As a result, local authorities became increasingly reliant on the eviction and demolition powers created by legislation such as PISA[19] and the Slums Act.[20]

It is evident that in urban areas the use of group areas legislation, the PISA and the Slums Act, culminated in a vicious cycle of discrimination, distress and human misery. Persons who were unable to find suitable, affordable accommodation in their own group areas either turned to unlawful squatting on vacant land, where they faced the threat of imminent demolition, or to the occupation of overcrowded buildings, where they risked possible conviction by the slum clearance court. Once their shacks and the buildings were demolished, the occupiers would set out to find alternative land or premises, only to be evicted yet again. Furthermore, the act of demolition itself greatly contributed to the housing shortage and to general homelessness, which in turn contributed to the informal settlement problem.

Against this broader background, and with reference to case law, the remainder of section 2 explains how property owners' and local authorities' demolition powers were augmented by the PISA, and by subsequent amendments to PISA. The section describes how these powers were employed to further the apartheid ideal of a racially

[17] Schoombee H and Davis D 'Abolishing influx control-fundamental or cosmetic change? (1986) 2 *SAJHR* 208-219 at 218 and to the same effect O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 374. Schoombee and Davis explain that the term 'orderly urbanization' was introduced to mask sensitive political issues as technical issues which called for 'technocratic' answers.

[18] Van der Walt AJ 'Towards the development of post-*apartheid* land law: an exploratory survey' (1990) 23 *De Jure* 1-45 at 26.

[19] Act 52 of 1951.

[20] Act 53 of 1934.

segregated society. This section also shows how the legislation increasingly ousted the jurisdiction of the courts to hear demolition and eviction cases in certain instances. Furthermore, this section explains how PISA deprived so-called unlawful occupiers of common law remedies in circumstances where they were evicted and their homes demolished. Finally, the section briefly refers to those provisions of the Slums Act 53 of 1934 that supplemented the local authorities' power to demolish slum-like informal settlements and buildings mostly occupied by indigent black South Africans.

2 2 2 The Prevention of Illegal Squatting Act 52 of 1951

2 2 2 1 The 1940s squatter movement and the 1944 War Measure

As mentioned above, the notorious Prevention of Illegal Squatting Act, otherwise known as PISA, played a prominent role in apartheid history because it promoted, and authorised, the forced removal of unlawful occupiers from private and state-owned land. This section refers to the legislative predecessor of PISA, namely the 1944 War Measure, which was enacted under the War Measure Act,[21] and describes the historic events that led up to the promulgation of PISA.

The 1940's squatter movements resulted in the enactment of legislation to preserve the affluent, western facade of South African cities. It is estimated that during this period between 60 000-90 000 people were encouraged by rebellion leaders to occupy vacant land in Johannesburg.[22] Various factors contributed to the influx of people from the rural areas to the cities. Industrial growth during the Second World War, as well as a maize shortage that persisted throughout the war, persuaded the rural poor

[21] Proclamation 76 of 1944 in the *Government Gazette Extraordinary* 3325 of 6 April 1944. The 1944 War Measure was enacted under the War Measures Act 13 of 1940.

[22] O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 366.

to seek sustenance in the city.[23] The war also caused other food items to become increasingly scarce, especially in rural areas.[24] Another factor that contributed to urbanisation in South Africa was the 'land hunger' experienced by the black rural population, as a direct consequence of the imposition of the Black Land Act,[25] and later the Development Trust and Land Act.[26] These circumstances motivated thousands of unskilled workers and their families to flock to Johannesburg, in the hope of earning higher wages as labourers in the city's industries.

In the urban areas, a severe housing shortage, low wages and considerable transportation costs encouraged unlawful occupiers to take control of vacant land.[27] The first squatting movement, named the Mpanza or Sofasonke movement, under the leadership of James 'Sofasonke' Mpanza, was initiated during March 1944, when a group of sub-tenants from townships moved onto a vacant piece of land in Orlando. At first 250 shacks were erected and later, at the height of the movement, the camp

[23] Stadler AW 'Birds in the cornfield: squatter movements in Johannesburg, 1944-1947' Paper, History workshop: The Witwatersrand: Labour, Townships and Patterns of Protest, University of the Witwatersrand, Johannesburg, 3-7 February 1978 1-22 at 3, and to the same effect, O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 365.

[24] Stadler AW 'Birds in the cornfield: squatter movements in Johannesburg, 1944-1947' Paper, History workshop: The Witwatersrand: Labour, Townships and Patterns of Protest, University of the Witwatersrand, Johannesburg, 3-7 February 1978 1-22 at 3.

[25] Act 27 of 1913.

[26] Act 18 of 1936. Stadler AW 'Birds in the cornfield: squatter movements in Johannesburg, 1944-1947' Paper, History workshop: The Witwatersrand: Labour, Townships and Patterns of Protest, University of the Witwatersrand, Johannesburg, 3-7 February 1978 1-22 at 3 and to the same effect O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 346.

[27] For a detailed account of the factors that contributed to the unlawful occupation of land in Johannesburg refer to Stadler AW 'Birds in the cornfield: squatter movements in Johannesburg, 1944-1947' Paper, History workshop: The Witwatersrand: Labour, Townships and Patterns of Protest, University of the Witwatersrand, Johannesburg, 3-7 February 1978 1-22 at 3-11.

housed 20 000 people.[28] Various other movements were initiated (with varying degrees of success) during the following years.

The 1944 War Measure was enacted in an attempt to control the alarming rate of urbanisation in South African cities during and after the war.[29] This measure prescribed the eviction of unlawful occupiers, and the subsequent demolition of the structures that they had built on vacant land.[30] Interestingly, the national government and the local government of Johannesburg were in disagreement as to when and how the War Measure should have been implemented to remove unlawful occupiers from land. The national government was sensitive to the industries' need for cheap labour, and it preferred to ignore the ever-growing townships on the outskirts of the city.[31] By contrast, the Johannesburg City Council (the City Council), became increasingly desperate to evict the Mpanza squatters and other unlawful occupiers, in an effort to preserve the character of the city. Eventually, on 18 February 1946, the City Council obtained the eviction order, and with the assistance provided by 750 policemen and women, the settlement was disbanded. Later – after the conclusion of the eviction and demolition proceedings – 200-300 families simply moved to another empty plot in the area.[32] The Fagan Commission was appointed to conduct an investigation to determine why the War Measure had failed to control the process of urbanisation. It determined that

[28] Stadler AW 'Birds in the cornfield: squatter movements in Johannesburg, 1944-1947' Paper, History workshop: The Witwatersrand: Labour, Townships and Patterns of Protest, University of the Witwatersrand, Johannesburg, 3-7 February 1978 1-22 at 11.

[29] Proclamation 76 of 1944 in the *Government Gazette Extraordinary* 3325 of 6 April 1944.

[30] Specifically, the War Measure enabled a magistrate to order the immediate eviction of persons (who were considered unlawful occupiers) and the demolition of their homes, if he was of the opinion that their living circumstances posed a health and safety risk to the unlawful occupiers or to the public in general.

[31] Stadler AW 'Birds in the cornfield: squatter movements in Johannesburg, 1944-1947' Paper, History workshop: The Witwatersrand: Labour, Townships and Patterns of Protest, University of the Witwatersrand, Johannesburg, 3-7 February 1978 1-22 at 10.

[32] Stadler AW 'Birds in the cornfield: squatter movements in Johannesburg, 1944-1947' Paper, History workshop: The Witwatersrand: Labour, Townships and Patterns of Protest, University of the Witwatersrand, Johannesburg, 3-7 February 1978 1-22 at 13 and to the same effect O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 367.

oppressive measures such as the War Measure could not be implemented in isolation to fight urban squatting, and other measures had to be introduced.[33] The War Measure remained in operation, despite its inadequacies, until the Prevention of Illegal Squatting Act was promulgated by the National Party government in 1951.

2 2 2 2 The Prevention of Illegal Squatting Act 52 of 1951

The Prevention of Illegal Squatting Act 52 of 1951 (PISA), enacted to replace the War Measure, formed part of the newly elected National Party government's influx control policy.[34] PISA adopted some of the War Measure's provisions, albeit with significant differences. Like the War Measure, PISA required of the courts to order the demolition of structures as part and parcel of eviction proceedings initiated by the local authorities.[35] This section enabled the courts to eject from land and buildings persons who had been convicted of an offence in terms of section 2 of the Act, and encouraged the courts to 'issue such further orders, give such instructions, and confer such authority as may be reasonably necessary … to ensure the demolition and removal from the said land, building, native location, village or area of all buildings or structures which may have been erected thereon by any person or on his behalf'.[36] PISA differed from the War Measure in that it stipulated that unlawful occupiers should be given three days

[33] O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 367.

[34] O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 367. As explained in 2 2 1 above, the influx control policy was only abolished in 1986. This means that the Prevention of Illegal Squatting Act 52 of 1951, as amended, was employed as an influx control measure, as well as a measure to ensure the orderly urbanization of South African cities.

[35] Sections 3(1)(a) and 3(1)(b)(iii) of Act 52 of 1951.

[36] Section 3(1)(b)(iii) of Act 52 of 1951. Section 5(1)(b)(iii) bestowed similar demolition powers on the magistrate of a district or the native commissioner. The demolition provision in the 1944 War Measure differed slightly from section 3(1)(b)(iii) of Act 52 of 1951 in that the former expressly provided an additional ground for the demolition of structures, namely that the structure posed a risk to the safety or health of the public in general, or any other class of persons, including the person that was residing unlawfully on the land.

notice prior to the granting of eviction and demolition orders by the magistrate, to afford the occupiers the right to be heard.[37] PISA also pioneered the imposition of criminal liability on any person who contravened the provisions contained in section 1 of the Act.[38] *S v Peter*,[39] one of the more famous cases decided under the demolition provisions of PISA, is discussed below.

2 2 2 3 S v Peter 1976

The appellant in *S v Peter*[40] appealed against a conviction in terms of section 2 (read together with section 1) of PISA, as well as against a demolition order granted by the court *a quo* in terms of section 3 of the Act.[41] Ms Peter was one of 1000 unlawful occupiers who were evicted from a vacant stand, known as Crossroads in the Cape

[37] Section 5(1)(b)(aa) and (bb) of Act 52 of 1951; O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 367.

[38] Section 1(a) of Act 52 of 1951 provided that no person could enter upon land, or remain on land, without the consent of the owner of the land, unless said person was authorised by law to be on the property, or unless he was an employee of the government or the local authority. Similarly, section 1(b) of Act 52 of 1951 provided that a person could not enter upon, or remain on or in any native location, native village, or other area demarcated by the administration of native affairs, unless he had the consent of the local authority, or of the person who was in control of such an area. Section 2(1) of the Act stated that any person who contravened the provisions of section 1 would be 'guilty of an offence and liable to a fine not exceeding twenty-five pounds, or to imprisonment for a period not exceeding three months, or to both such fine and imprisonment'. *R v Zulu* 1959 (1) SA 263 (A), confirmed that section 1 created two offences, namely the entering on property without lawful reason, and the remaining on property without lawful reason. Roos J 'On illegal squatters and spoliation orders' (1988) 4 *SAJHR* 167-178 at 171 explains that the implication of the two offences was that a lessee, who lawfully entered upon land in terms of a lease contract, who breached the contract provisions, and who did not evacuate the premises immediately (on receipt of notice that the contract had been cancelled), could have been found guilty of contravening section 1 of PISA. This illustrates the wide powers that were bestowed on owners and local authorities by the Act.

[39] 1976 (2) SA 513 (C).

[40] 1976 (2) SA 513 (C).

[41] 1976 (2) SA 513 (C) 513.

Peninsula, on the basis of PISA.[42] The court *a quo* determined that the state had succeeded in proving that the appellant had wrongfully and unlawfully entered and resided on the land, without the consent of the owner.[43] In the subsequent appeal, the court determined that the Bantu Affairs Administration Board (the Board) was not the owner or the lawful occupier of the land in question, and that the owner was in fact the Cape Divisional Council (the Council).[44] The court concluded that no statutory authority was conferred on the Board, and that it therefore did not have the power to evict the unlawful occupiers from the land. Consequently, the conviction, sentence, eviction and demolition orders were set aside by the court.[45]

As a result of the Board's failure to secure the eviction of the occupiers, the Council approached the Chief Magistrate of Wynberg (the Magistrate) to initiate an enquiry in terms of section 5 of PISA.[46] This section envisaged the removal of unlawful occupiers from land or occupied buildings, and the concomitant demolition of their structures on account of health and safety considerations.[47] The Council argued that Crossroads posed certain health risks and that it should be demolished.[48] In response, counsel for the occupiers contended that Crossroads had to be declared an emergency camp as prescribed by section 6 of PISA. The Magistrate determined that Crossroads

[42] 1976 (2) SA 513 (C) 514. In the case it is explained that during 1975 about a 1000 occupiers were found guilty of unlawfully occupying the site. However, this was a futile exercise because during that year the number of occupiers increased to about 7000 people. Budlender G 'South African legal approaches to squatting' (1988) 242 *De Rebus* 160-164 at 161 explains that many of the occupiers at Crossroads had moved onto the site on the instructions of officials that wanted to centralise the so-called squatting problem.

[43] 1976 (2) SA 513 (C) 513H.

[44] 1976 (2) SA 513 (C) 516H and 517H.

[45] 1976 (2) SA 513 (C) 518A.

[46] O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 370 explains that this section was originally adopted from the 1944 War Measure, but it was amended in 1951 to provide the unlawful occupiers with legal representation throughout the enquiry.

[47] Refer to section 5(1)(a), (b)(i) and (iii) of Act 52 of 1951.

[48] O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 371.

did indeed represent a health hazard, but the number of occupiers had increased to nearly 10 000 people, and he was hesitant to conclude that the legislature envisaged the removal of so many people at the same time. Consequently, on 29 June 1976, the Council designated Crossroads as an emergency camp.[49]

2 2 2 4 Reaction to S v Peter: summary powers of demolition

The first amendment to PISA, introduced by the Prevention of Illegal Squatting Amendment Act 92 of 1976 (the 1976 Amendment Act), was a consequence of the state's failure to secure a conviction, together with an eviction and demolition order, in the *Peter* case.[50] Essentially, these amendments compelled land owners and lessees to summarily demolish structures that had been built on their land, if these structures were erected without building plans that had been approved by the local authority.[51] Failure on the part of the land owner or lessee to demolish structures, and to evict squatters (provided the circumstances as described in sections 3A(1)(a)(i) and (ii) were present), amounted to an offence punishable by the imposition of a fine, or imprisonment, or both.[52] Once an owner or lessee was convicted of an section 3A(2) offence he was obliged, upon the expiry of seven day period (during which he could lodge an appeal),

[49] O' Regan C 'No more forced removals? An historical analysis if the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 371.

[50] Budlender G 'South African legal approaches to squatting' (1988) 242 *De Rebus* 160-164 at 161 and to the same effect O' Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 371.

[51] Section 3A(1)(a)(i) of Act 92 of 1976. In a similar vein, section 3A(1)(a)(ii) of Act 92 of 1976 provided that the owner shall not permit the occupation of structures (erected without his approval on his land) if, in the opinion of the health authority, the said occupation would have endangered the health and safety of the public generally, or of a particular group or class of persons, including the persons that resided in those structures. Moreover, section 3A(1)(c) of Act 92 of 1976 inferred the land owner's or the lessee's consent, if it was proven in prosecution proceedings that the unlawful occupiers resided on land under the circumstances envisaged in section 3A(1)(a)(ii) of the Act.

[52] Section 3A(2) of Act 92 of 1976.

to demolish structures erected on his land at his own expense.[53] Alternatively, the local authority was authorised to demolish the structures at the owner's expense.[54]

Section 3A of the 1976 Amendment Act was a particularly vicious provision, because it coerced property owners to evict occupiers, and to demolish their homes by extending criminal liability to those land owners who chose to turn a blind eye to the unlawful occupation of their land.[55] Nevertheless, this feature was deemed inadequate to make an impact on the growth of informal settlements by itself and, as a result, the legislature introduced an additional provision, section 3B. This section enabled land owners to demolish buildings and structures that had been built on their land without their consent, without obtaining a court order.[56] An owner was entitled to remove the materials from his land, once he had demolished the structures.[57] Similar demolition powers were afforded to local authorities in relation to structures that were situated within their jurisdiction. Section 3B(1)(b) provided that an officer of the local authority had the power, without a court order, and at the expense of the owner, to demolish

[53] Section 3A(3) of Act 92 of 1976.

[54] Section 3A(4)(b) of Act 92 of 1976. Section 3A(4)(a) imposed criminal liability on any person who failed to comply with the provisions as contained in section 3A(3). Such a person was liable to pay a maximum amount of R30 for each day that he failed to demolish the structures or, alternatively, he faced imprisonment for a period of seven days. Accordingly, the land owner or lessee could be held criminally liable under section 3A(2), as well as under section 3A(4)(a) of the Act.

[55] As explained above, section 2(1) and (2) read with section 1 of the Prevention of Illegal Squatting Act 52 of 1951 only imposed criminal liability on unlawful occupiers.

[56] Section 3B(1)(a) of Act 92 of 1976. Roos J 'On illegal squatters and spoliation orders' (1988) 4 *SAJHR* 167-178 at 171 argues that the provisions of PISA were drafted with a wide scope. Roos explains that, in addition to the two offences created by section 1 of PISA, section 3B(1)(a) of 1976 Amendment Act could be interpreted to mean that a property owner would have been entitled to demolish any structure erected on his property by a lessee, without his consent. The court in *Vena v George Municipality* 1987 (4) SA 29 (C) confirmed that property owners are not afforded similar powers under the common law.

[57] In *Beyers and others v Mlanjeni and others* 1991 (2) SA 392 (C) 396E-I, the court confirmed, on the basis of *Kwanobuhle Town Council v Andries and others* 1988 (2) SA 796 (SE), that PISA, as amended, did not deprive the owner of any common or civil law remedies normally available if property is unlawfully occupied.

structures that had been erected without the consent of the land owner.[58] The only safeguard provided to the unlawful occupiers was a seven day notice (given by the abovementioned parties) of the intended demolition.[59]

2 2 2 5 Fredericks and another v Stellenbosch Divisional Council 1977

Fredericks and another v Stellenbosch Divisional Council (*Fredericks*),[60] is one of the more famous cases decided under the 1976 amendments to PISA. This case is significant because it not only illustrates the distress that unlawful occupiers experienced when faced with imminent demolition, but also the courageous attempts of legal representatives and some courts to circumvent the consequences of the provisions of PISA as amended.

The first and second applicants erected shacks on a vacant piece of land owned by the respondent, the Divisional Council of Stellenbosch (the Council).[61] Without notifying the applicants, employees of the Council demolished their shacks and

[58] Likewise, section 3B(1)(c) provided that the officer of the Department of Community Development (nominated by the Minister of Community Development), or a officer of the Bantu Affairs Administration Board (nominated by the Minister of Bantu Administration and Development) could, without a court order, and at the expense of the owner of the land, demolish unlawfully occupied buildings and structures erected on the property without the owner's consent. Furthermore, section 3B(3)(a) stipulated that the owner was compelled to inform the Department of Community Development in writing of any structure erected on his land and, in terms of section 3B(3)(b), failure of the owner to do so amounted to a criminal offence punishable by a fine, imprisonment or both. Both sections 3B(1)(b) and (c) were amended by the Prevention of Illegal Squatting Amendment Act 33 of 1980 to enable the respective authorities to demolish occupied structures, situated in their respective jurisdictions, if those structures were not built in accordance with approved building plans. It seems that this amendment enabled the demolition of structures, even if they were built with the consent of the owner of the land. Act 33 of 1980 also incorporated a measure, section 3D, which extended the jurisdiction of the local authorities for purposes of the Act.

[59] Section 3B(2) of Act 92 of 1976.

[60] 1977 (3) SA 113 (C).

[61] 1977 (3) SA 113 (C) 115.

removed their possessions to unknown premises.[62] Both applicants asserted that they had been spoliated of their property. They sought an order compelling the Council to restore to them the possessions of which they had been deprived and, further, to rebuild their shacks as they stood before the demolition.[63]

In the opposing affidavit, the Council acknowledged that it did not have the legal right to demolish the houses, as it had failed to provide the applicants with notices as required by section 3B(2) of 1976 Amendment Act. The respondent attempted to justify its actions by arguing that the applicants were in unlawful occupation of the land, which amounted to trespassing. Moreover, the shacks were built in violation of building regulations, and the applicants had not obtained the necessary approval from the local authority to build the said structures.[64]

The court admonished the respondent for relying on the unlawful actions of the applicants, when the Council itself had acted 'in flagrant contempt of the law' by disregarding the modest protection that PISA afforded to unlawful occupiers in general.[65] It further expressed shock at the cruel treatment of the applicants and their families during the process of demolition.[66] The court held that the respondent's conduct could not be condoned and, accordingly, it granted the mandament van spolie to the applicants. In so doing, the court reversed the eviction and demolition proceedings undertaken in terms of PISA.[67]

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[62] 1977 (3) SA 113 (C) 115.

[63] 1977 (3) SA 113 (C) 115-116. The applicants further sought an order calling upon the respondent to show why it should not have been interdicted from demolishing the shacks (again) after the re-erection.

[64] 1977 (3) SA 113 (C) 116-117.

[65] 1977 (3) SA 113 (C) 116-117.

[66] 1977 (3) SA 113 (C) 117.

[67] 1977 (3) SA 113 (C) 118. The respondent's arguments and the court's findings in relation to the mandament van spolie are considered in section *2 2 2 7* below.

2 2 2 6 Reaction to Fredericks: ousting the jurisdiction of the court

2 2 2 6 1 Introduction

It is evident from the *Fredericks* decision that some legal representatives and judges relied on common law remedies and technicalities to evade the consequences of PISA. These attempts were deemed as attacks on the honour of the National Party government.[68] In response to the outcome of the *Fredericks* case, the legislature amended section 3B(2) to exclude the seven day notice previously granted to unlawful occupiers prior to the demolition of their homes.[69] Consequently, to avoid criminal prosecution, land owners were compelled to immediately demolish all structures that were built or *occupied*[70] on their land without their consent, without giving any form of notice to the unlawful occupiers.[71] The legislature also introduced an ouster provision, section 3B(4)(a), which was designed to exclude the courts' discretion in instances where homes were demolished in accordance with section 3B of PISA, unless the occupier could prove that he had a right or a title to land.[72] Section 3B(4)(a) had two

[68] O' Regan C 'No more forced removals? An historical analysis if the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394 at 372-373.

[69] Section 3B(2) of Act 92 of 1976 was replaced with section 3B(2) of Act 72 of 1977, which read '[a] building or structure referred to in subsection (1) may be demolished, and the material and contents removed from the land in question, without any prior notice of whatever nature to any person'.

[70] Section 3B(1)(a) of Act 72 of 1977.

[71] As explained above, section 3B(3)(b) of Act 92 of 1976 imposed criminal liability on land owners who failed to demolish structures built on their land.

[72] Section 3B(4)(a) of the Prevention of the Illegal Squatting Amendment Act 72 of 1977. This section was later amended by the Prevention of the Illegal Squatting Amendment Act 104 of 1988 and an additional requirement was added, namely that a person (who sought the protection of the court in the instance of demolition proceedings) had to prove that *mala fide* action had been taken against him. Stated differently, a person not only had to prove that he had a right or title to the land, but also that the demolition (or the intended demolition) of his house was an action taken in bad faith.

interrelated purposes, namely to prevent the court from hearing demolition cases, and to prevent occupiers from relying on the mandament van spolie to assert their rights.[73]

As a result of their far-reaching consequences, sections 3B(1)(a) and (4)(a) received the most judicial consideration of all the PISA provisions. With reference to three renowned cases, the section below describes the various interpretations that were afforded to these provisions. The discussion below further refers to how section 3B(4)(a) impacted on occupiers' ability to assert their rights on the basis of the mandament van spolie.

2 2 2 6 2 Vena and another v George Municipality 1987

In *Vena and another v George Municipality* (*Vena*),[74] the court firstly had to determine whether section 3B(4)(a) of PISA precluded it from granting a spoliation order for the restoration of the applicants' homes that were demolished by the respondent

[73] Budlender G 'South African legal approaches to squatting' (1988) 242 *De Rebus* 160-164 at 161 explains that in addition to the two traditional requirements of a spoliation order – peaceful possession and unlawful deprivation of possession – PISA added another requirement, namely that a person had to prove that he had a right or title to the land of which he had been spoliated. The promulgation of the Prevention of Illegal Squatting Amendment Act 104 of 1988 introduced yet another requirement to the mandament van spolie, namely that a person had to prove that he was deprived of his property in bad faith. Roos J 'On illegal squatting and spoliation orders' (1988) 4 *SAJHR* 167-178 at 176-177 suggests that many applications for spoliation orders might not even have reached the courts, since these provisions created new statutory defences that weighted the law in favour of the state. Litigants who did succeed in accessing the courts were faced with the daunting onus of proving, in addition to the requirements for a spoliation order, that they had a right or title to the land, and that they had been dispossessed of that land in bad faith. However, this heavy onus was only triggered once the respondent had proven the jurisdictional fact, namely that the demolition was founded on section 3B. The respondent also had to provide evidence in support of his belief that the occupation of the property was unlawful. Roos is of the view that once the merits of the applicant's case (with reference to the section 3B(4)(a) enquiry) had been decided, the possibility for ancillary relief would have become more likely. The reason for this is that after the section 3B(4)(a) enquiry, the court would have been in a better position to order ancillary relief than it would have been to grant a spoliation order at the initial stages of the application.

[74] 1987 (4) SA 29 (C).

municipality.[75] The court further had to determine whether the respondent had acted within the scope of section 3B(1)(a) of PISA. Vena, the first applicant, was a resident on the property since 1970, but her house was destroyed by fire in 1987. She undertook to immediately restore her home to its former condition on the original foundation, only to have the new structure demolished by the respondent. The respondent municipality also demolished an extension that the second applicant had built onto his house.[76] The respondent argued that section 3B(1)(a) of PISA enabled it to demolish these buildings as the applicants did not have a right to reside on the property. It contended that the right to lawfully reside on the property had been terminated some time before the demolition of the buildings. Moreover, the respondent had not consented to the building of structures on its land.[77]

The court established that both applicants were tenants of the respondent at the time of the demolition, which meant that they had a right or title to the land, as required by section 3B(4)(a) of the Act.[78] Accordingly, the court did have the jurisdiction to hear the case. In the second part of the enquiry, the court set out to determine whether the respondent had acted in its capacity as a local authority or as a land owner.[79] The court decided that the respondent acted as a land owner, and that it could rely on section 3B(1)(a) of PISA. With regard to the first applicant's house, the court concluded that it had stood on the premises for years, during which time the respondent had failed to raise any objection. Consequently, the only inference to be drawn was that the respondent had tacitly consented to the erection of the first applicant's house on its

[75] 1987 (4) SA 29 (C) 33C-H.

[76] 1987 (4) SA 29 (C) 31F-G and 53A-F. Both applicants approached the Cape Provincial Division of the High Court for a spoliation order, calling upon the respondent to restore their houses to their previous condition, and for an interdict prohibiting the respondent from demolishing the homes again. The first applicant also sought a declaration of right to enable her to complete the restoration of her house.

[77] 1987 (4) SA 29 (C) 33F-H.

[78] 1987 (4) SA 29 (C) 47B.

[79] 1987 (4) SA 29 (C) 47.This enquiry was necessary to determine whether the respondent should have based its defence on either section 3B(1)(a) or on 3B(1)(b) respectively. The latter provision enabled the local authority to demolish structures, while the former enabled the owner to demolish structures on its property.

property.[80] Similarly, the second applicant's house had stood on the premises for years without objection from the respondent.[81] Both applicants admitted that they did not obtain prior consent to proceed with the re-erection of the house and building of the additional room respectively. The court held that it had to determine whether the lack of consent in this regard was sufficient to justify demolition under section 3B(1)(a) of the Act.[82]

A strict literal interpretation of section 3B(1)(a) indicated that every structure built without consent could be demolished by the owner,[83] but the court held that this interpretation did not correspond with the intention of the legislature, as the purpose of the Act was to prevent the unlawful occupation of land.[84] The correct interpretation of section 3B(1)(a) was that an owner would be compelled to demolish buildings that had been built on his land, without his consent, by unlawful occupiers.[85] Lawful occupiers (like the applicants) should not have been subjected to the same treatment, even when they had built their houses without obtaining the prerequisite consent, because their occupation was not unlawful as envisaged by PISA.[86] The court held that it is a fundamental principle of our law that a person should not resort to self help. Legislation must be read in a manner that interferes with this principle as little as possible.[87] The court was of the view that section 3B(4)(a) meant that a person who faced pending demolition proceedings, would be able to turn to the court for protection, if it was proven that he had a right or title to the land in question.[88] This interpretation indicated that the legislature did not intend the summary demolition of buildings built by lawful occupiers, and in such instances the court would invoke the ordinary measures to prevent self

[80] 1987 (4) SA 29 (C) 48C.

[81] 1987 (4) SA 29 (C) 48E.

[82] 1987 (4) SA 29 (C) 48I.

[83] 1987 (4) SA 29 (C) 50F. This interpretation was later followed in *Port Nolloth Municipality v Xhalisa and others*; *Luwalala and others v Port Nolloth Municipality* 1991 (3) SA 98 (C).

[84] 1987 (4) SA 29 (C) 50F-J.

[85] 1987 (4) SA 29 (C) 50H-J.

[86] 1987 (4) SA 29 (C) 51D.

[87] 1987 (4) SA 29 (C) 51D.

[88] 1987 (4) SA 29 (C) 51E-F.

help.[89] The court referred to the title of the Act as well as to the preamble, and concluded that section 3B(1)(a), read within the context of the statute as a whole, was only aimed at regulating cases where buildings had been erected on land by unlawful occupiers.[90]

The court held that the first applicant was simply restoring a house that had initially been erected lawfully.[91] Moreover, her house was situated on the property for such a long time that one could infer that if there were any building contraventions, such contraventions had been waived by the respondent.[92] As a result, the respondent could not rely on section 3B(1)(a) to justify the demolition of the first applicant's house. In a similar vein, the second applicant had at the time of the demolition lawfully occupied his plot, which effectively precluded the respondent's reliance on section 3B(1)(a) of PISA.[93] The court held that the respondent had erred in proceeding to demolish both applicants' homes without a court order, and that it should have followed one of two possible approaches. Firstly, certain by-laws or regulations might have been applicable to the property, and the respondent should have complied with the regulations if they were binding on the area.[94] Secondly, provided the regulations did not apply to the property, the relationship between the respondent and the applicants was that of a lessor and lessees. In terms of this common law relationship, the respondent could not demolish structures that had been built by the applicants without a court order.[95] In light of these considerations, the court held that the respondent had acted unlawfully in demolishing the homes of the applicants and, in line with the *Fredericks* case, the court granted the spoliation order, including an order compelling the respondent to restore the homes as they stood before the demolition.[96]

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[89] 1987 (4) SA 29 (C) 51G-H.

[90] 1987 (4) SA 29 (C) 51G-H.

[91] 1987 (4) SA 29 (C) 52A.

[92] 1987 (4) SA 29 (C) 52B.

[93] 1987 (4) SA 29 (C) 52C.

[94] 1987 (4) SA 29 (C) 49I-51E.

[95] 1987 (4) SA 29 (C) 50E.

[96] 1987 (4) SA 29 (C) 52D.

2 2 2 6 3 George Municipality v Vena and another 1989

The court of appeal in *George Municipality v Vena and another* (*George Municipality v Vena*),[97] overturned the court *a quo's* finding in relation to the second respondent (the second applicant in the court of first instance). More specifically, the court of appeal concluded that the second respondent had not proven that he was a tenant of the appellant prior to the demolition. As a result, section 3B(4)(a) of PISA prevented the court from assisting the second respondent by granting a spoliation order.[98] The court agreed with the conclusion reached by the court *a quo*, namely that a spoliation order had to be granted to restore the first respondent's house to its former condition. However, the court relied on a different interpretation of the provisions of the PISA in support of its finding. More specifically, the court disagreed with the court *a quo's* finding that section 3B(1)(a) was only applicable to buildings that were erected by unlawful occupiers, without the land owner's consent.[99]

The court explained that the long title indicated that the main purpose of the Prevention of Illegal Squatting Act 52 of 1951 was to prevent, and regulate, the illegal occupation of land. It further explained that inferences drawn from the long title had to yield to the ordinary meaning of the language.[100] The court reasoned that it was undoubtedly the legislature's intention to require the land owner to 'demolish or remove any building or structure *erected or occupied* on the land without his consent …'.[101] Moreover, in addition to relying on the long title of PISA, one had to consider the long

[97] 1989 (2) SA 263 (A).

[98] 1989 (2) SA 263 (A) 269C-270D.

[99] 1989 (2) SA 263 (A) 270F-G.

[100] 1989 (2) SA 263 (A) 269G-I.

[101] 1989 (2) SA 263 (A) 269H-I. This is a reference to section 3B(1)(a) as amended by Act 72 of 1977.

titles of the amending acts.[102] The court concluded, with reference to these long titles, that it could not find support for the notion that section 3B(1)(a) only applied to buildings occupied without the owner's consent.[103] Section 3B(4)(a) did not support such a finding

[102] 1989 (2) SA 263 (A) 269-270F. To illustrate its argument the court referred to section 3B(1)(a) as it stood in the Prevention of Illegal Squatting Amendment Act 92 of 1976, where it was stated that 'the owner of land may without an order of court demolish any building or structure erected on the land without his consent, and remove the material from the land …'. The court also referred to the long title of Act 92 of 1976, which indicated that the purpose of the amending Act was, amongst other things, to provide for the demolition of buildings or structures erected without the consent of the owner of the land. Section 3B(1)(a) was further amended by the Prevention of Illegal Squatting Amendment Act 72 of 1977, where the words 'or occupy' were inserted after the word 'erected'. Furthermore, the long title of Act 72 of 1977 indicated that the purpose of the amending Act was to extend the owner's power of demolition to buildings that had been occupied on his land without his consent.

[103] 1989 (2) SA 263 (A) 270F-H.

either, since it was not the intention of the legislature to exclude the operation of section 3B(1)(a) once it was proven that the occupier had a right or title to the land.[104]

The court was also critical of the effect that the court *a quo's* interpretation of section 3B(1)(a) would have on the operation of section 3B(1)(b) of PISA. It argued that section 3B(1)(b) clearly afforded the municipality the power to demolish buildings that were erected or occupied with the consent of the owner, including buildings erected by the owner himself. A local authority could only exercise its section 3B(1)(b) power if it did not own the property in question.[105] The construction of section 3B(1)(a) favoured by the court *a quo* had the implication that a local authority that was also the owner of the land would not be able to demolish buildings that had been built on its land, without its

[104] 1989 (2) SA 263 (A) 270F-H. Similar sentiments were expressed in *Port Nolloth Municipality v Xhalisa and others*; *Luwalala and others v Port Nolloth Municipality* 1991 (3) SA 98 (C) 116C-E, where the court held that section 3B(1)(a) enabled the demolition of structures that were erected or occupied without the owner's consent. In this case the court further stated that 'it is not without significance that the words "erected and occupied" are in the past tense – it could never have been the intention of the Legislature to permit the owner of land, who had some time in the past consented to a building being erected thereon and to its occupation by another, and who now revokes that consent, to enter upon it and without a "by your leave" set about demolishing it'. Roos JW 'On squatters and spoliation orders II' (1989) 5 *SAJHR* 395-405 at 402 argues, with reference to the *Xalisa*/*Luwalala* decision, that a land owner could not revoke his consent if he had on a previous occasion consented to the erection and the occupation of a structure on his property. Similarly, the land owner could not proceed to demolish buildings if in the past he had given his consent for the erection of the structures. The reason provided by the court in *Xalisa/Luwalala* was that if the law was any different, land owners would not have had to resort to court orders to remove tenants who defaulted on the payment of their rent. However, Roos argues that there is one difficulty, namely that at the time when the *Xalisa*/*Luwalala* case was decided, section 3B(4)(a) stipulated that the applicant had to prove that he 'has a right or a title to land'. This provision was formulated in the present tense, and it may lead one to the conclusion that demolition was permitted (in terms of section 3B(1)(a)) if the owner had revoked his permission. Roos argues that when hearing a PISA case, a court first had to establish whether the demolition was founded on section 3B(1)(a) or section 3B(1)(b) of the Act. If the owner had not consented to the erection of structures on the land, the demolition would have been authorised by PISA. If the consent was granted and later revoked the demolition would not have been permitted, and the owner would not have been able to rely on section 3B(4)(a) to oust the jurisdiction of the court.

[105] 1989 (2) SA 263 (A) 270F-J.

consent, by lawful occupiers.[106] However, if the municipality did not own the land it would have been able to demolish buildings built with the owner's consent as well as buildings built by the owner himself.[107] Accordingly, the court *a quo's* interpretation of section 3B(1)(a) created an inconsistency, which in the opinion of the appeal court could not have been intended by the legislature.[108]

The court agreed with the court *a quo's* finding that it was a widely accepted principle that a person's possession of property could only be interfered with by due process of law. This principle could, nevertheless, be altered by Parliament.[109] The court confirmed that a provision had to be construed restrictively if it enabled a property owner – without first resorting to the due process of the law – to demolish a building that was built without his consent.[110] In light of this consideration, the court held that section 3B(1)(a) meant that the owner could have consented to the construction of a building before, during, or even after it had been completed. The consent could have been granted expressly, impliedly, orally, in writing or even by way of conduct, and further it could have been granted in broad terms.[111] If the owner granted his consent for the construction of a building and the building varied from what he had anticipated, that would not amount to sufficient reason for him to allege that he had not consented to the construction of that specific structure. Naturally, if the owner had consented to a specific building, such as a house, and something entirely different had been built instead, he would have been able to argue that he had not given his consent in that regard.[112] The court concluded that it would have to refer to the facts of each individual case to

[106] 1989 (2) SA 263 (A) 270H-J.

[107] 1989 (2) SA 263 (A) 270H-I.

[108] 1989 (2) SA 263 (A) 270J.

[109] 1989 (2) SA 263 (A) 271F.

[110] 1989 (2) SA 263 (A) 272D. This principle was later confirmed in *Port Nolloth Municipality v Xhalisa and others*; *Luwalala and others v Port Nolloth Municipality* 1991 (3) SA 98 (C) 115A-B.

[111] 1989 (2) SA 263 (A) 272F-H. The court explained that the consent granted by the owner was different from the consent granted by the local authority because different factors would have been taken into account in the respective scenarios. The type of consent required by the local authority was that envisaged in section 3B(1)(b) and section 3A of PISA.

[112] 1989 (2) SA 263 (A) 272I-273A.

ascertain whether consent had been granted.[113] Furthermore, the owner bore the onus of proving that he had not consented to the construction of the building on his land.[114]

The court held that there was no evidence in support of the finding that appellant's consent did not extend to the re-erection of the first respondent's house after the fire.[115] It further held that the purpose of section 3B(1)(a) would not have been frustrated by the continued existence of buildings that were erected on the land with the owner's consent.[116] As a result the appeal was dismissed.[117]

2 2 2 6 4 Mpisi v Trebble 1992/1994

In the *Mpisi v Trebble*[118] cases, the respective courts set out to determine whether demolition included the destruction of personal belongings and building materials. This was a relevant enquiry because of the operation of the section 3B(4)(a) ouster provision. The courts' jurisdiction would have been ousted if 'demolish' as intended in PISA included the destruction of the abovementioned goods. By contrast, a narrow interpretation of 'demolish', would have meant that an unlawful occupier could at least have approached the court for a damages claim, based on destruction of its belongings and building materials.

In this case the respondent, acting on behalf of the owner of the property, demolished the shacks that were occupied by the appellants. The respondent also

[113] 1989 (2) SA 263 (A) 273B.

[114] 1989 (2) SA 263 (A) 273C-D.

[115] 1989 (2) SA 263 (A) 273F.

[116] 1989 (2) SA 263 (A) 274F-H.

[117] 1989 (2) SA 263 (A) 275.

[118] 1992 (4) SA 100 (N) and 1994 (2) SA 136 (A).

caused all building materials and the contents of the shack to be set alight and destroyed.[119]

The Natal Provincial Division (the court *a quo*) determined that section 3B(4)(a) only excluded actions founded on the demolition of a structure and on the removal of the material from the property as envisaged in section 3B of PISA. This section did not exclude destruction of the contents of a shack as there was 'no statutory justification for demolition or burning of the contents of the structure'.[120] The court *a quo* concluded that the appellant was entitled to a damages award for the contents of the shack that had been destroyed.[121]

With reference to the destruction of the building materials, the appellants argued that demolition only implied the 'pulling or throwing down of the structure', and that it did not entail 'greater damage to the material constituting the structure than that necessarily inflicted in the act of demolition pursuant to the Act'.[122] The court *a quo* disagreed with this interpretation and held that there was no justification for ascribing such a restricted meaning to the word 'demolish'.[123] It held that the correct meaning of 'demolish' was 'to destroy by disintegration of the fabric of the structure and to reduce to ruin', and that section 3B(1)(a) did not imply that the property owner should have dismantled the structure or should have taken it apart gingerly.[124] The court *a quo* further held that the appellant failed to allege that his shack was a movable, and that he did not provide evidence that proved that he was the owner of the structure. Moreover, the appellant

[119] 1994 (2) SA 136 (A) 140D-G. Initially, the appellant approached the magistrate's court for a damages order. In response, the respondent raised a special plea, namely that because of the operation of section 3B(4)(a) of PISA, the court did not have the jurisdiction to adjudicate the matter. The respondent also requested that the appellant prove the damages, which had been suffered by him. The magistrate upheld the respondent's plea, and dismissed the damages claim, and the appellant appealed to the Natal Provincial Division.

[120] 1992 (4) SA 100 (N) 102H.

[121] 1992 (4) SA 100 (N) 102H-J.

[122] 1992 (4) SA 100 (N) 103A-B.

[123] 1992 (4) SA 100 (N) 103C.

[124] 1992 (4) SA 100 (N) 103C-D.

failed to prove that he suffered damages as a result of the destruction of the shack.[125] Accordingly, the court was unable to grant a damages order in respect of the building materials that had been destroyed.[126]

In the subsequent appeal,[127] the Appellate Division (the court) held that it was evident that the court's jurisdiction would only be ousted if the demolition proceedings were founded on the basis of section 3B(1)of PISA.[128] Relying on *Vena and another v George Municipality*,[129] the court decided that the purpose of the Act was to prevent unlawful occupation of land and buildings.[130] It remarked that it was not unnatural to sympathise with a land owner faced with the dilemma of the unlawful occupation of his land, but such an owner could not take the law into his own hands.[131] In light of this consideration, the court had to ascertain whether the respondent's actions fell within the scope of section 3B(1)(a). This involved the interpretation of the word 'demolish' to determine whether the respondent's conduct were contemplated by the Act.[132]

With reference to *Fredericks*[133] and *George Municipality v Vena*,[134] the court explained that in the event of ambiguity, the word 'demolish' had to be interpreted in a manner that would be the least burdensome to the person that suffered loss.[135] The court referred to English and Afrikaans dictionaries and decided that none of the definitions of 'demolish' or '*sloop*' embodied the concept of destruction and, as a result,

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[125] 1992 (4) SA 100 (N) 103G-J. The court stated that even if the appellant proved that he had suffered damage as a consequence of the demolition, no evidence was provided to the court concerning the value of the materials that had been lost.

[126] 1992 (4) SA 100 (N) 104D.

[127] *Mpisi v Trebble* 1994 (2) SA 136 (A).

[128] 1994 (2) SA 136 (A) 141G.

[129] 1987 (4) SA 29 (C) 50J.

[130] 1994 (2) SA 136 (A) 141J.

[131] 1994 (2) SA 136 (A) at 141J-142A. In this regard, the court held that 'it is a fundamental principle that he may only act in a manner, and within the limits, authorised by law, be it common law or statute'.

[132] 1994 (2) SA 136 (A) 141H.

[133] *Fredericks and another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) 118D.

[134] *George Municipality v Vena and another* 1989 (2) SA 263 (A) 271E-G.

[135] 1994 (2) SA 136 (A) 142G.

a narrower definition would suffice for the purposes of the PISA.[136] Moreover, the wording in section 3B(1)(a) itself supported the notion of a restrictive interpretation of demolition, as the section enabled the land owner to 'demolish any building or structure … and remove the material from the land'.[137] Clearly, the legislature had not anticipated the overall destruction of structures, as section 3B(1)(a) required the owner to remove the building materials left over from the demolition from the land. The court was of the view that section 3B(1)(a) meant that the land owner was permitted to 'demolish the appellant's shack in the sense of pulling or tearing it down' and that in the process of demolition, greater damage should not have been caused to the materials 'than was reasonably necessary for, or incidental to, that purpose'.[138] Consequently, the respondent's actions had exceeded the limits of the Act as the section did not authorise indiscriminate destruction of all the appellant's possessions. The result was that the respondent was excluded from relying on section 3B(4)(a) of the Act to oust the jurisdiction of the court in this matter.[139]

2 2 2 6 5 Rikhotso v Northcliff Ceramics (Pty) Ltd and others 1997

The court in *Rikhotso v Northcliff Ceramics (Pty) Ltd and others*[140] had to determine whether section 3B(1)(a) authorised the respondents to burn building materials after the dwellings of the unlawful occupiers had been dismantled. It also had to determine whether it could grant a spoliation order to compel the respondents to rebuild structures that had been set alight and destroyed.[141] Relevant to the present discussion is the court's findings in relation to the scope of section 3B(1)(a) of PISA. The court's findings in relation to the mandament van spolie are considered in greater detail in section 2 2 2 7 below.

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[136] 1994 (2) SA 136 (A) 142G-143D.

[137] 1994 (2) SA 136 (A) 143C-D.

[138] 1994 (2) SA 136 (A) 143D-E.

[139] 1994 (2) SA 136 (A) 143E-G.

[140] 1997 (1) SA 526 (W).

[141] 1997 (1) SA 526 (W) 528A-529G.

The court explained that section 3B(1)(a) made serious inroads on the common law because a person is usually not permitted to take the law into his own hands.[142] This meant that section 3B(1)(a) had to be interpreted restrictively and that a land owner had to prove that he acted strictly within the parameters of the section to justify his actions.[143] With reference to *Mpisi v Trebble*,[144] the court held that section 3B(1)(a) did not authorise the respondents to burn the applicants' homes. The section only authorised the respondents to dismantle the homes and to remove the building materials from the property. Consequently, the court concluded that the respondents' actions were unlawful.[145]

Not all the applicants suffered the same fate and the court had to determine whether the actions of the respondents were lawful in respect of those occupiers whose building materials had not been destroyed.[146] The applicants argued that the respondents had tacitly consented to the erection of the informal dwellings on their land, which meant that they were barred from invoking section 3B(1)(a) in support of their actions. The applicants also relied on *Mpisi v Trebble*[147] to argue that the section authorised contra-spoliation, and that the failure of the owners to act swiftly (once becoming aware of the unlawful occupation of their land) indicated that they had consented to the occupiers' presence on their land.[148] The court decided that *Mpisi v Trebble* did not support the applicants' argument and that such an interpretation of section 3B(1)(a) would render owners' rights obsolete. Section 3B(1)(a) enabled land owners to demolish structures that had been built without their consent and a time limit was not provided in the section. The court held that the delay of the land owners to act could do nothing more than give rise to an inference of consent.[149] Furthermore, the respondents did give notice to the occupiers to remind them of prior oral warnings

[142] 1997 (1) SA 526 (W) 530A-J.

[143] 1997 (1) SA 526 (W) 530F.

[144] 1994 (2) SA 136 (A).

[145] 1997 (1) SA 526 (W) 531C.

[146] 1997 (1) SA 526 (W) 531D.

[147] 1994 (2) SA 136 (A).

[148] 1997 (1) SA 526 (W) 531F-G.

[149] 1997 (1) SA 526 (W) 531H.

requesting them to vacate the property by a certain date.[150] The court held that the respondents had acted lawfully, as they had acted well within their rights in terms of section 3B(1)(a) of PISA.[151]

2 2 2 7 The mandament van spolie

The applicants in *Fredericks and another v Stellenbosch Divisional Council* (*Fredericks*)[152] successfully raised the mandament van spolie[153] as a defence to demolitions, which did not fall exactly within the scope of PISA. In *Fredericks* the court decided that the demolitions were unlawful because the owner had failed to give the occupiers the seven day notice as required by section 3B(2) of the Prevention of Illegal Squatting Amendment Act 92 of 1976.[154] With reference to *Yeko v Qana*,[155] the court explained that the purpose of the mandament van spolie is to restore the *status quo ante*, regardless of the lawfulness of the possessor's prior possession.[156] The court granted the mandament van spolie, and extended the remedy to cater for the situation where dwellings were purposefully destroyed during the process of demolition to avoid a

[150] 1997 (1) SA 526 (W) 531H-I.

[151] 1997 (1) SA 526 (W) 532A.

[152] 1977 (3) SA 113 (C).

[153] In the authoritative judgment of *Nino Bonino v De Lange* 1906 TS 120 at 122-123, the court explained that the mandament van spolie is a remedy to prevent self help. The court held that no one is allowed to take the law in his own hands by dispossessing another of property (movable or immovable). If a person unlawfully dispossesses another person of property, the court will summarily, before enquiring into the merits of the dispute, order the restoration of the *status quo ante*. Violence is not a prerequisite for the granting of the mandament; the only requirement is that a person was dispossessed of property without his consent. In *Yeko v Qana* 1973 (4) SA 735 (A) 516, the court explained that to obtain a spoliation order, an applicant has to prove that he was in possession of the property, and that he was unlawfully dispossessed. Possession does not necessarily mean possession in the juridical sense. It will be sufficient if the applicant proves that even though he was not the owner of the property, he was holding the property to secure a benefit for himself. See to the same effect Badenhorst PJ, Pienaar JM & Mostert M *Silberberg and Schoeman's The law of property* 5 ed (2006) 288-289, 292-293, 301-302.

[154] 1977 (3) SA 113 (C) 116-117. Refer to *2 2 2 5* above for a discussion of the case.

[155] 1973 (4) SA 735 (A).

[156] 1977 (3) SA 113 (C) 116-117.

restoration order. In this regard, the court explained that the dwellings were built from generic materials and that it saw no reason as to why the owner could not recreate similar shelters from similar materials.[157] As a result, the court ordered the respondent to rebuild the structures that it had destroyed.[158]

As explained in section *2 2 2 6* above, in response to *Fredericks* the legislature specifically enacted section 3B(4)(a) of PISA[159] to oust the jurisdiction of the courts, and to prevent occupiers from relying on the mandament van spolie in demolition cases, unless they could prove that their occupation was lawful. This provision did not deter the courts from restrictively interpreting the demolition provisions of PISA so that they could grant spoliation orders,[160] or other remedies, for any action that was not specifically authorised by the Act.[161] However, *Rikhotso v Northcliff Ceramics (Pty) Ltd and others*[162] created uncertainty as to whether the mandament van spolie could be employed in instances where dwellings were completely destroyed as part of eviction and demolition. In this case the court had to decide whether it could order the

[157] 1977 (3) SA 113 (C) 117-118.

[158] 1977 (3) SA 113 (C) 117-118.

[159] Section 3B(4)(a) of the Prevention of Illegal Squatting Amendment Act 72 of 1977.

[160] Badenhorst PJ, Pienaar JM & Mostert M *Silberberg and Schoeman's The law of property* 5 ed (2006) 304-305 enumerate five possible defences to a spoliation order, namely (a) denial of the facts in issue; (b) restoration is impossible; (c) lapse of time; (d) counter-spoliation and (e) *exceptio spolii*. The defence of impossibility has been raised in eviction and demolition cases. See for example *Ntshwaqela v Chairman, Western Cape Regional Services Council* 1988 (3) SA 218 (C), where the respondenst coerced the occupiers to move to another piece of land by threatening them with criminal prosecution under PISA. The court decided that the occupiers had been spoliated of their possession of the land. In response, the respondents argued that as they were not the owners of the land, it was impossible for them to restore possession of the land to the occupiers. The court concluded that the mere fact that a person was not in possession of the property at the time of spoliation did not necessarily amount to the impossibility on the part of the spoliator to restore possession. As a result, the spoliator could be ordered to restore possession if it was reasonably possible for him to do so. The court held that the respondents could, with the assistance of their employees, restore possession of the land to the occupiers.

[161] See for example *Mpisi v Trebble* 1994 (2) SA 136 (A), where the court held that demolition for purposes of PISA did not include the burning of unlawful occupiers' dwellings. The court ordered the respondent to pay damages to the appellant for the material that was destroyed.

[162] 1997 (1) SA 526 (W).

respondents to furnish replacement of the houses that it had unlawfully destroyed.[163] The court explained that the mandament van spolie was a temporary measure designed to restore possession of the property. It reasoned that a spoliation remedy was not suitable in instances where property had been destroyed, since possession of the original could not be restored.[164] Most academic authors support this view.[165] Some authors argued that the purpose of the remedy is to restore peaceful possession, and that it was therefore not limited to restore possession of the original property. A court should order the restoration of property if it consisted of generic materials, and if it was deliberately demolished to avoid a restoration order.[166]

The court explained that there was little support for the notion that a replacement should be provided as an extension of the spoliation remedy in cases where the

[163] 1997 (1) SA 526 (W) 532G.

[164] 1997 (1) SA 526 (W) 532H-J.

[165] 1997 (1) SA 526 (W) 533A-F. The court further explained that it is recognised principle that the court can order the spoliator to restore the object of spoliation to the state in which it was at the time of the spoliation. In support of this principle the court relied, amongst others, on the authoritative judgment of *Zinmann v Miller* 1956 (3) SA 8 (T). Furthermore, in decisions such as *Vena and another v George Municipality* 1987 (4) SA 29 (C); *Jones v Claremont Municipality* (1908) 25 SC 651 and *Tshabalala v West Rand Administration Board and another* 1980 (2) SA 520 (W), the courts ordered the spoliator to restore the property to the state in which it was before the spoliation. The court explained that the common factor in these cases was that in none of the instances had the property completely been destroyed.

[166] 1997 (1) SA 526 (W) 533E-J. The court cites Blecher MD 'Spoliation and demolition of legal rights' (1978) 95 *SALJ* 8-16; Van der Walt AJ '*Naidoo v Moodley*: mandament van spolie' (1983) 46 *THRHR* 237-240 and Van der Walt AJ 'Nogeens *Naidoo v hMoodley* – 'n repliek' (1984) 47 *THRHR* 429-439. Van der Walt AJ 'Nogeens *Naidoo v Moodley* – 'n repliek' (1984) 47 *THRHR* 429-439 at 438 argues that there are instances where it would serve no purpose to order the spoliator to provide a substitute for the spoliated goods. An example of such an instance would be where a valuable painting was destroyed by the spoliator. Conversely, there are instances where the court should order the spoliator to provide a substitute for the destroyed goods. For example, the spoliator can be ordered to rebuild a shack with new generic materials such as corrugated iron sheets. Van der Walt argues that the nature of the property destroyed should be a relevant factor when determining whether it would be impossible to restore the spoliated goods.

property had been destroyed. It held that it could not grant a spoliation order if the property ceased to exist.[167] The court concluded that:

> 'I do not suggest that the law countenanced wanton destruction, nor that it does not afford a remedy. Remedies to discourage such conduct exist in both civil and criminal law. My conclusion is only that the mandament is not that remedy'.[168]

More recently, in *Tswelopele Non-Profit Organisation and others v City of Tshwane Metropolitan Municipality and others* (*Tswelopele*),[169] the Supreme Court of Appeal confirmed that it would not develop the mandament van spolie to provide for situations where shacks and dwellings had been destroyed. The court explained that to order the respondents to provide a replacement (on the basis of the mandament van spolie) would result in the creation of a different, much wider remedy than was originally received into South African law.[170] Moreover, the focus of the remedy, as a possessory action, would be lost.[171] Instead of developing the mandament van spolie, the court elected to craft a new constitutional remedy that enabled it to order the respondents to rebuild those structures that they had unlawfully destroyed.[172] Whether or not the mandament van spolie should actually have been developed in *Tswelopele* remains a contentious issue.[173]

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[167] 1997 (1) SA 526 (W) 535A-B.

[168] 1997 (1) SA 526 (W) 535B-C.

[169] 2007 (6) SA 511 (SCA). For a discussion of this case, refer to Van der Walt AJ 'Property law' (2007) 2 *JQR* 2.1; Van der Walt AJ 'Developing the law on unlawful squatting and spoliation' (2008) 125 *SALJ* 24-36.

[170] 2007 (6) SA 511 (SCA) 521D-E.

[171] 2007 (6) SA 511 (SCA) 521D-F.

[172] 2007 (6) SA 511 (SCA) 522-523.

[173] There is a vast amount of academic work on the subject of whether the mandament van spolie should be developed to enable the restoration of especially shacks and dwellings that were demolished. Van der Walt AJ 'Developing the law on unlawful squatting and spoliation' (2008) 125 *SALJ* 24-36 refers to some of these academic works.

2 2 3 The Slums Act 53 of 1934

Van der Walt explains that in urban areas other legislative measures such as those contained in the Trespass Act 6 of 1959, the Slums Act 76 of 1979 and the Health Act 63 of 1977 were used in collaboration with the provisions of the Prevention of Illegal Squatting Act 52 of 1951 (PISA), to forcibly remove people from certain areas.[174] This section briefly refers to those provisions of the Slums Act 53 of 1934 (the Slums Act), as amended, that were used to support the local authorities' demolition powers in terms of PISA.

Section 1(2) of the Slums Act authorised the local authority to declare certain areas or buildings as slums.[175] Once an area was declared a slum, the local authority was authorised to request of the owner, in writing, to remove the nuisance within three months of receipt of the written notice.[176] If, however, the local authority was of the view that the buildings situated on the property were so dilapidated or so defectively constructed that the nuisance could not be remedied, it could request the owner to demolish the buildings and to remove the material within a certain time stipulated in the notice.[177] Failure of the owner to comply with the demolition notice constituted an

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[174] Van der Walt AJ 'Toward the development of post-*apartheid* land law: an exploratory survey' (1990) 23 *De Jure* 1-45 at 32.

[175] Section 1(2) of Act 53 of 1934 required of a medical officer of health to inspect slum-like properties or buildings. In terms of section 3(1)(a) and (b) of Act 53 of 1934, the officer was obliged to report any nuisance that existed on the land to the local authority, that was required to take reasonable steps to remove the nuisances or slum-like conditions from the area. According to section 1(2)(a)-(e) of Act 53 of 1934, the property would constitute a nuisance if the following circumstances existed: if the whole or part of the premises was in such a state or so situated or so dirty and verminous as to be injurious or dangerous to health or liable to favour the spread of any infectious disease; or if the premises were in such an state to be injurious and dangerous to health; or if any property was so congested with buildings as to be injurious or dangerous to health and if the premises did not have an adequate water supply available within a reasonable distance.

[176] Section 5(1)(a) of Act 53 of 1934.

[177] Section 5(1)(b) of Act 53 of 1934. The functions of the local authority were later to some extent taken over by the slum clearance court that ordered the demolition of the buildings. Section 4 of Act 76 of 1979 stipulated that courts had to be established in the district of each local authority.

offence.[178] The local authority was further authorised, upon the failure of the owner to comply with the notice, to remove the nuisance and to sell any materials in recovery of the expenses that it had incurred.[179]

The Slums Act also stipulated that occupiers had to be removed from any area that had been declared a slum, and that continued occupation of premises earmarked for demolition constituted an offence.[180] Furthermore, the Slums Act imposed criminal liability on any owner who failed to ensure that the premises remained unoccupied.[181] The court ordered the eviction of any person found guilty of the unlawful occupation of a slum, and such an order was not subject to an appeal.[182] Finally, section 29(2) stated, amongst other things, that the owner would not be excused from his demolition duties on the grounds that no suitable accommodation was available to the occupants of the building.[183]

It is plain to see how these provisions could have been employed in conjunction with the eviction and demolition provisions in PISA to deter rural black citizens from moving to or staying in urban areas. As explained above, housing shortages made it problematic for black citizens to find suitable accommodation in urban areas. Those who were able to find accommodation were forced to live in either informal settlements,

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[178] Section 5(2) and section 5(3) of Act 53 of 1934. The provisions of the Slums Act 53 of 1934, as amended, were challenged in some cases. Plaintiffs mostly relied on irregularities in the process of declaring property as a slum to avoid the demolition of their homes or buildings. See for example *Rex v Vumisa* 1950 (2) SA 585 (N), where the appellant narrowly escaped a demolition order because the Health Commission lacked the *locus standi* to grant such an order. See further *R v Pillay* 1958 (4) SA 141 (T), where the appellant appealed against a demolition order granted in terms of section 5(1)(b) of the Act. The Transvaal Provincial Division overturned the decision of the magistrate's court on the grounds of an irregularity, which invalidated the Council's declaration of the premises as a slum.

[179] Section 9(1) and (2) of Act 53 of 1934.

[180] Section 11 of Act 53 of 1934 prohibited entering into a property set out for demolition.

[181] Section 12 of Act 53 of 1934 imposed a duty on the owner to ensure that the premises remained vacant. Section 12(4) of Act 53 of 1934 stipulated that non-compliance of the owner in this regard amounted to an offence.

[182] Section 28(1) and 28(7) of Act 53 of 1934.

[183] Section 29(2) of Act 53 of 1934.

or impoverished areas that were prone to slum-like conditions. Occupiers who resided in informal settlements faced eviction not only in terms of PISA, but also in terms of the Slums Act. Likewise, occupiers who resided in decaying buildings and homes were likely to be evicted in terms of the Slums Act. Evictees and other persons unable to find suitable accommodation were compelled to return to their impoverished homelands.

2 2 4 Conclusion

The Prevention of Illegal Squatting Act 52 of 1951 (PISA) and the Slums Act 53 of 1934 formed part of an intricate web of laws designed, amongst other things, to create racially segregated urban areas. These laws were mostly enforced by local authorities and private land owners. Local authorities were specifically authorised to evict already marginalised black people from private and public land and to demolish their dwellings under the auspices of health, safety and building laws and regulations.

Likewise, private land owners were required to demolish structures on their property if they had been built without approved building plans, or if they had been declared a slum. PISA further bolstered land owners' common law eviction and demolition powers as it enabled them to demolish structures that had been erected or occupied without their consent, without having to obtain a court order. Evidently, these provisions could easily have been abused by land owners who initially permitted the occupation of their land, only to revoke their consent at a later stage. Van der Walt explains that the Roman Dutch perception of property – received into South African law during the seveteenth and eighteenth centuries – was dominated by the belief that ownership was an absolute right 'in the sense that it was the pinnacle of a hierarchy of rights in property, and in the sense that it was a fundamentally exclusive individual right'.[184] Collectively, these characteristics created the impression that ownership would always be a stronger right, unless a person could prove that he possessed a real right in

[184] Van der Walt AJ 'Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *SALJ* 258-311 at 271.

the property that was either created or assented to by the land owner.[185] Apartheid legislation such as PISA perpetuated this perception of ownership as an absolute right by creating powers that far exceeded owners' entitlements under the common law. PISA further ensured that land owners' and local authorities' actions would not be scrutinised in a judicial setting since section 3B(4)(a) of PISA ousted the jurisdiction of the courts to hear demolition disputes, unless the occupier could prove that he had a right or title to the land and, further, that his building was demolished in bad faith.[186] It is, however, ironic that PISA created the impression that ownership was an inviolable right when it had, in actual fact, drastically interfered with ownership entitlements and imposed criminal liability on any owner who failed to comply with the provisions of the Act. The new constitutional dispensation recognises that ownership is not an absolute right and that it can be regulated in the public interest. Importantly, regulatory measures must be imposed in terms of law of general application and may not arbitrarily interfere with the exercise of ownership entitlements. This is a dramatic departure from the apartheid era where legislative measures such as PISA eroded ownership entitlements to further the political ideals of the government. The Constitution provides an objective standard against which all regulatory laws will be measured.

2 3 Exercising demolition powers within the framework of the Constitution

2 3 1 Introduction

Apartheid laws such as PISA created the impression that ownership was an absolute right although they extensively regulated the exercise of ownership entitlements. The Constitution by contrast, expressly recognises that ownership can be regulated in the public interest, provided that the regulatory interference meets certain requirements.

[185] Van der Walt AJ 'Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *SALJ* 258-311 at 271.

[186] As explained in section *2 2 2 7* above, this provision prevented occupiers from asserting their rights on the basis of the mandament van spolie, a common law remedy that would usually have been available to them in circumstances where they were summarily dispossessed of their property.

The limitations imposed on ownership by legislation reflect the prevailing needs of the broader public and they can change as society evolves.

Poverty and homelessness is one of the greatest current problems in South Africa. This could in part be ascribed to the forced removals and demolitions of the apartheid era which, at the time, greatly depleted the housing stock and destroyed supporting social and economic networks. Apartheid legislation such as PISA and the Slums Act[187] enabled the creation of sprawling townships consisting of shacks and informal shelters right next to affluent white suburbs, and contributed to the overcrowded and squalid circumstances in impoverished black townships and informal settlements.[188] These circumstances have in some instances prompted destitute black people to find alternative accommodation in dilapidated inner-city buildings; it is estimated that in Johannesburg alone there are about 235 occupied 'bad buildings'.[189] Some of these buildings have become unlawfully occupied because they were deserted by their owners.[190] In other instances the buildings are simply not maintained because the land was purchased for development or speculation purposes. There are also rare instances where some of the units in decaying inner-city residential buildings are still occupied by owners who cannot afford to move to alternative accommodation. Finally, there are

[187] Act 53 of 1934.

[188] See for example, *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) paras 114-116, where the court indicated how the apartheid evictions and demolitions impacted on the development of urban areas. This case is discussed in greater detail in section *2 3 3 1* below.

[189] Centre on Housing Rights and Eviction (COHRE) *Any room for the poor? Forced eviction in the city of Johannesburg, South Africa* (2005) http://www.escrnet.org/usr_doc/COHRE_Johannesburg_FFM_high_res.pdf (accessed 3 February 2010) at 6.

[190] Centre on Housing Rights and Eviction (COHRE) *Any room for the poor? Forced eviction in the city of Johannesburg, South Africa* (2005) http://www.escrnet.org/usr_doc/COHRE_Johannesburg_FFM_high_res.pdf (accessed 3 February 2010) at 6 and 17. This report explains that many of the buildings had been deserted by their owners during the late 1980s and early 1990s because of the abolition of influx control measures. These owners were apparently no longer willing to invest in the inner city and preferred to channel their money into newly established economic centres. The report further explains that the conditions in the inner city further deteriorated because of the municipalities' failure to enforce health and safety by-laws.

buildings that were initially lawfully occupied by people who were either tenants or who had an informal arrangement with the owner. Their occupation later became unlawful because of changed circumstances.

Section 25(1) of the Constitution now regulates any state interference with private property rights. This section recognises that property rights can be regulated by legislation in the public interest, provided that the regulation is imposed in terms of law of general application and may not result in an arbitrary deprivation of property. In essence, section 25(1) acknowledges that the ownership of property, especially land, is accompanied by certain obligations that can vary according to the prevailing needs of society. The notion that ownership consists of entitlements as well as obligations directly conflicts with the traditional view, namely that ownership is an absolute right.

Section 26(3)[191] was included in the Constitution as a direct result of the apartheid history of arbitrary evictions, forced removals and demolitions that were, to some extent, made possible by the weak tenure rights of black citizens.[192] Van der Walt explains that these tenure rights will continue to become weaker, even though apartheid laws have been abolished, 'unless they are strengthened by equally systematic and structural reforms in the Constitution and various land reform laws'.[193] He further explains that the tenure reform process to date employed two strategies, namely the adoption of anti-eviction provisions to prevent arbitrary evictions and demolitions, and 'the implementation of individualised structural reforms to strengthen

[191] Section 26 of the Constitution is divided into three subsections. Section 26(1) provides that '[e]veryone has the right to have access to adequate housing'. This subsection should be read with 26(2), which states that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.

[192] Van der Walt AJ *Constitutional property law* (2005) 310 (currently 3 ed (2011)), but the relevant chapter was omitted from the new edition).

[193] Van der Walt AJ *Constitutional property law* (2005) 310 (currently 3 ed (2011)), but the relevant chapter was omitted from the new edition).

and support specific weak and unsuitable tenure forms'.[194] The anti-eviction strategy is grounded in section 26(3), which states that:

> 'No one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions'.

Section 26(3) has three main purposes. Firstly, it recognises the injustices suffered by some South Africans under the apartheid eviction and demolition laws and, secondly, it upholds the constitutional values of human dignity, freedom and equality by prohibiting arbitrary eviction and demolition procedures. Thirdly, section 26(3) recognises that eviction and demolition can take place, provided that it is not arbitrary and that it is authorised by law of general application, and carried out in accordance with a court order. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)[195] was enacted in response to the constitutional obligations embodied in section 26(3) of the Constitution, and its central function is to prevent the illegal eviction of unlawful occupiers.[196] Illegal eviction refers to eviction procedures that do not comply with the provisions of sections 4, 5 or 6 of the Act. These sections ensure that eviction proceedings – and by implication demolitions – occur only when they are properly authorised by law and carried out in a manner that is procedurally and substantively fair. PIE, in direct contrast to PISA, requires of owners and local authorities to comply with procedural as well as substantive fairness requirements when seeking an eviction order from the court.[197] The purpose of the substantive fairness requirements is to draw the

[194] Van der Walt AJ *Constitutional property law* (2005) 310 (currently 3 ed (2011)), but the relevant chapter was omitted from the new edition). The second strategy is based on section 25(6) and 25(9) of the Constitution, which stipulates that parliament must promulgate laws that provide those who, as a result of past discriminatory laws, have insecure tenure with tenure security or equitable redress. Van der Walt explains that various laws have been enacted in compliance with section 25(9) of the Constitution.

[195] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 repealed the Prevention of Illegal Squatting Act 52 of 1951.

[196] Act 19 of 1998 defines 'unlawful occupier' as 'a person who occupies land without the express or the tacit consent of the owner or the person in charge, or without any other right in law to occupy such land...'.

[197] Van der Walt AJ *Property in the margins* (2009) 149.

court's attention to the unique circumstances of the occupier and to the historical and political circumstances that largely contributed to the housing shortage in South Africa.[198] Special consideration is also given to the most vulnerable persons such as the elderly, women, or children whose rights were simply disregarded under apartheid.

The section 26(3) rights of the occupiers of the informal townships and inner-city buildings have recently been judicially considered in disputes concerning the rejuvenation and redevelopment of occupied inner-city buildings. Two of the more interesting cases are discussed in greater detail below. This discussion shows the conflicting interests that arise when the owner or the local authority seeks the eviction of unlawful occupiers to enable the demolition or redevelopment of a structure, and how this conflict of interests is dealt with in terms of the new constitutional framework. More specifically, the *Olivia Road*[199] cases show an underlying conflict between the demolition of supposedly dangerous or dilapidated existing housing structures, and the building of new housing stock. The series of *Blue Moonlight Property*[200] cases illustrates the tension between the land owners' rights in relation to their buildings; the duties of local authorities (that must observe section 25 rights and fulfil section 26 obligations) and the inner-city poor who fear the loss of their homes. Both these cases further raise the question: to what extent can one expect a land owner to tolerate unlawful occupiers on his property? The discussion in this section shows that the conflict between land owners, local authorities and unlawful occupiers is dealt with very differently in the new constitutional framework than was the case during apartheid.

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[198] Van der Walt AJ *Property in the margins* (2009) 149.

[199] *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (1) SA 78 (W); *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (6) SA 417 (SCA) and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC).

[200] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* 2009 (1) SA 470 (W); *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) *and City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA).

2 3 2 The *Olivia Road* cases

2 3 2 1 City of Johannesburg v Rand Properties (Pty) LTD and others 2007

In *City of Johannesburg v Rand Properties (Pty) LTD and others*,[201] the City of Johannesburg (the applicant) instituted eviction proceedings to evict 300 occupiers (the respondents) from decaying inner-city properties. These buildings included residential houses, a high rise building and a double-storey retail building. The applicant was of the view that the buildings were unfit for human habitation as they were dangerous, unhygienic and extremely overcrowded. One building had already been partially destroyed in a fire.[202] The applicant based its application on section 12(4)(b)[203] of the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act), section 20[204] of the Health Act 63 of 1977 (the Health Act) and certain

[201] 2007 (1) SA 78 (W). For a discussion of this case, refer to Van der Walt AJ 'Constitutional property law' (2006) 1 *JQR* 2.4.

[202] 2007 (1) SA 78 (W) para 18.

[203] Section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 stipulates that if the local authority deems it necessary for the safety of any person it may, by way of notice in writing, order a person who occupies a building to either vacate that building immediately or within the time period stipulated in the notice. Section 12(5) provides that no one is permitted to occupy a dangerous building once the local authority has delivered the notice in terms of section 12(4)(b). In terms of section 12(6), any person who contravenes the provisions of section 12 shall be guilty of an offence and shall be liable, on conviction, to a fine of R100 for each day he contravenes the provision. These sections should be read with section 12(1), which provides that if the local authority is of the view that a building is so dilapidated that it constitutes a threat to life or property, it may order the owner to either demolish the building, or to alter it so that it no longer poses a threat to the public. Alternatively, if the local authority is of the view that the building is so dangerous that it constitutes an imminent threat to life or property, it may without giving notice to the owner, proceed to demolish, or alter the building. In such circumstances, the local authority will recover the costs from the owner.

[204] Section 20(1) of the Health Act 63 of 1977 provides that '[e]very local authority shall take all lawful, necessary and reasonably practicable measures – (a) to maintain its district at all times in a hygienic and clean condition; (b) to prevent the occurrence within its district of – (i) any nuisance; (ii) any unhygienic condition; (iii) any offensive condition, or (iv) any other condition which will or could be harmful or dangerous to the health of any person within its district or the district of any other local authority, or where a nuisance or condition referred to in sub-paras (i) to (iv), inclusive, has so occurred, to abate, or cause to be abated, such nuisance, or remedy, or cause to be remedied, such condition as the cause may be'.

fire by-laws.[205] Reasons advanced in support of the application were that the granting of an eviction order would 'promote public health and safety' and 'reverse inner-city decay'.[206] The applicant further requested of the court to not 'place a stop sign on its difficult road to upliftment of the inner city'.[207] This application was opposed on various grounds, including that it was unconstitutional for the applicant to rely on the Health Act and its fire by-laws to obtain an eviction order, and that some of the occupiers were unlawful occupiers, which meant that the applicant had to comply with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The respondents contended that the eviction would not be just and equitable as the city had failed to provide them with alternative accommodation as required by section 6 of PIE.[208] Finally, the respondents argued that subsections 12(4)(b), 12(5) and 12(6) of the Building Standards Act were unconstitutional as they violated the occupiers' constitutional rights in section 26(3) and section 9 of the Constitution.[209]

The court explained that the historical, social and political background set out in decisions such as *Port Elizabeth Municipality v Various Occupiers*[210] and *Modderklip*,[211]

[205] 2007 (1) SA 78 (W) paras 3-9.

[206] 2007 (1) SA 78 (W) para 5.

[207] 2007 (1) SA 78 (W) para 6.

[208] Section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 regulates evictions at the instance of an organ of state.

[209] 2007 (1) SA 78 (W) para 12. Section 9 of the Constitution is the equality clause and section 9(1), for example, states that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'. The respondents further argued that an eviction order would unjustifiably interfere with the respondents' right to access to adequate housing as embodied in section 26 of the Constitution. In this regard, the respondents contended that the applicant had failed to fulfill the positive obligation imposed on it by section 26(1) of the Constitution.

[210] 2004 (12) BCLR 1268 (CC). For a discussion of this case, refer to Van der Walt AJ *Property in the margins* (2009) 153-154 and to Liebenberg S *Socio-economic rights: adjudication under a transformative constitution* (2010) 273-279.

coupled with the relevant legal provisions, indicated that eviction is fundamentally a constitutional matter.[212] It further explained that it is necessary to reconcile municipalities' health and safety duties with the state's constitutional duty towards poor and destitute persons such as the respondents.[213] Moreover, the Constitution 'emphasises the need for concrete and case-specific solutions'.[214] With reference to *Government of the Republic of South Africa and others v Grootboom and others*,[215] the court emphasised that it was no longer adequate to rely on rationality to justify state actions. Rather, the Constitution requires of all 'stakeholders' to act 'reasonably to fulfil their constitutional duties regarding social and economic rights'.[216] With reference to *Port Elizabeth Municipality v Various Occupiers*,[217] the court further explained that when resolving a dispute it could not mechanically give preference to ownership, and that it should instead balance and reconcile conflicting rights by taking all interests and relevant factors into account.[218] A court should adopt a similar approach in a dispute where there is a conflict between the obligations of the local authority and the rights of

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[211] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC). For a discussion of these cases, refer to Van der Walt AJ *Constitutional property law* 3 ed (2011) 277-280; Van der Walt AJ 'The state's duty to protect property owners v the state's duty to provide housing: thoughts on the *Modderklip* case' (2005) 21 *SAJHR* 144-161; Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 43-47 and Liebenberg S *Socio-economic rights: adjudication under a transformative constitution* (2010) 439-442.

[212] 2007 (1) SA 78 (W) para 26.

[213] 2007 (1) SA 78 (W) para 26.

[214] 2007 (1) SA 78 (W) para 26.

[215] 2001 (1) SA 46 (CC).

[216] 2007 (1) SA 78 (W) para 27.

[217] 2004 (12) BCLR 1268 (CC).

[218] 2007 (1) SA 78 (W) paras 28 and 31-35. The court specifically referred to the apartheid abuses of eviction and demolition powers. It explained that the Prevention of Illegal Squatting Act 52 of 1951 granted local authorities and land owners wide powers to evict mostly marginalised people under the auspices of health, safety and planning regulation. The court further explained that under apartheid, the movement of people in the inner city was mostly regulated on the basis of race.

the unlawful occupiers.[219] This implicates that proof of the health and safety risks associated with the occupation of a building would only trigger a court's discretion to order eviction and that other circumstances – such as the personal circumstances of the occupier or the duration of occupation – will also be taken into account.[220] The court reasoned that it would be more sympathetic to occupiers who had resided in the building for some time than to occupiers who deliberately invaded a property with the view to disrupt the municipality's housing programme.[221] In this regard, the court referred to *Port Elizabeth Municipality v Various Occupiers*,[222] where Sachs J explained that the phrase 'all relevant circumstances' was inserted into section 26(3) of the Constitution to emphasise '[h]ow non-prescriptive the provision is intended to be'. Sachs J further explained that:

> '[t]he way in which the courts are to manage the process has, accordingly, been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission'.[223]

The court held that section 12(4)(b) of the Building Standards Act had to be read in line with section 26(3) of the Constitution.[224] This meant that the applicant could not evict the occupiers without complying with the necessary procedural and substantive requirements set out in PIE.[225] It was therefore not necessary to consider the constitutionality of section 12(4)(b) of the Building Standards Act.[226]

In relation to the applicant's duties under section 26(1) of the Constitution, the court explained that the right to adequate housing should not be misunderstood to mean that the state will provide housing for the entire population. Section 26(1)

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[219] 2007 (1) SA 78 (W) para 28.

[220] 2007 (1) SA 78 (W) para 29.

[221] 2007 (1) SA 78 (W) para 29.

[222] 2004 (12) BCLR 1268 (CC) para 22.

[223] 2007 (1) SA 78 (W) para 38, with reference to *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 22.

[224] 2007 (1) SA 78 (W) para 36.

[225] 2007 (1) SA 78 (W) para 37.

[226] 2007 (1) SA 78 (W) para 37.

should instead be interpreted to mean that the state will, within its available resources, cultivate an environment where everyone would have access to adequate housing. It also means that the state 'will protect and improve houses and neighbourhoods rather than damage or destroy them'.[227] Furthermore, section 26(1) of the Constitution requires of the state, and of other persons or institutions (such as the applicant), to respect the access to housing that some people have arranged for themselves, even if such housing is inadequate.[228] It is also the duty of the state to progressively realise the goal of creating a society where persons such as the occupiers are treated with equal concern and respect.[229] The court emphasised that when performing some of its functions such as inner-city regeneration, the applicant could not ignore the rights of the occupiers.[230] It was not disputed that the applicant had a legislative duty to eliminate unhealthy and dangerous environments that existed within its jurisdiction, but it could not do so in violation of the occupiers' section 26(1) and section 26(3) rights.[231] This was especially so in instances, as in this case, where the local authority failed to adhere to its constitutional duty to provide adequate alternative accommodation.[232]

The court explained that even though the circumstances in the buildings were unsatisfactory, it at least provided the occupiers with shelter and access to water. If

[227] 2007 (1) SA 78 (W) para 50.

[228] 2007 (1) SA 78 (W) para 54.

[229] 2007 (1) SA 78 (W) para 54.

[230] 2007 (1) SA 78 (W) para 54.

[231] 2007 (1) SA 78 (W) para 58.

[232] 2007 (1) SA 78 (W) paras 42-47 and 59. The court concluded that the city had failed to implement the Programme for Housing Assistance in Emergency Housing Circumstances as adopted in terms of the Housing Act 107 of 1997. Ultimately, this amounted to a failure on the part of the city to provide for those persons who stood to lose their home in an emergency. Furthermore, the existing housing programme was considered unreasonable as it did not cater for the poorest of the inner-city residents. The court explained that the failure of the applicant to provide access to adequate housing has forced the occupiers to live in dangerous buildings where they at least have access to basic shelter and water. Eviction from dangerous living conditions would exacerbate the circumstances of the unlawful occupiers. It could cause the unlawful occupiers to be deprived of their livelihood, which in turn could result in the loss of human dignity.

these occupiers were evicted they would be rendered homeless. Accordingly, the court called on the city, with the assistance of the provincial and national government, to devise a coherent plan that would provide these occupiers with access to adequate housing. It further confirmed that it was the responsibility of the applicant to engage with the occupiers and to clean the occupied buildings as part of its duty to render the city secure. In this regard the court referred to one of the buildings, which the occupiers had attempted to clean. This, the court stated, served as an example of how the applicant and the occupiers could 'improve their respective lots in a mutually constructive fashion'.[233] The court granted a declaratory order pronouncing that the applicant had failed to fulfil its statutory and constitutional obligations in respect of the inner-city poor. It ordered the applicant to create and implement a plan that would cater for the inner-city residents that are in need of adequate housing. The applicant was also interdicted from evicting the occupiers until a housing programme was implemented or until it could provide suitable adequate accommodation for those that faced eviction.[234]

2 3 2 2 City of Johannesburg v Rand Properties (Pty) Ltd and others (SCA) 2007

In *City of Johannesburg v Rand Properties (Pty) Ltd and others*,[235] the Supreme Court of Appeal overturned the decision of the court *a quo*, and it ordered the eviction of the occupiers from the inner-city buildings.[236] It held that the central issue in the dispute was whether the applicant was prohibited from evicting occupiers from unsafe buildings in the exercise of its health and safety duties, without first providing them with adequate alternative accommodation.[237] The Supreme Court of Appeal was of the view that the court *a quo* had confused the city's duty to prevent unhealthy

[233] 2007 (1) SA 78 (W) para 61.

[234] 2007 (1) SA 78 (W) para 67.

[235] 2007 (6) SA 417 (SCA).

[236] 2007 (6) SA 417 (SCA) para 78. For a discussion of this case, refer to Van der Walt AJ 'Constitutional property law' (2007) 2 *JQR* 2.2.

[237] 2007 (6) SA 417 (SCA) para 4.

and unsafe circumstances with the city's constitutional duty to provide access to adequate housing as enshrined in section 26(1).[238]

The court briefly explained what it believed to be the correct interpretation of section 26(1) and (3) of the Constitution. It reasoned that section 26(1) of the Constitution places a positive[239] and a negative duty on the state.[240] Section 26(1) imposes a negative obligation insofar as it requires of the state, other entities or persons, to desist from interfering with the right of access to adequate housing that persons might enjoy at present.[241] The Constitutional Court has not yet defined the negative content of section 26(1). It is clear that anyone has the right to adequate housing, but this right can be justifiably limited on the basis of section 36 of the Constitution.[242] The court further explained that section 26(3) of the Constitution has three effects. Firstly, section 26(3) does not condone the arbitrary seizure of land, which means that it creates a defensive rather than an affirmative right.[243] Secondly, it acknowledges that eviction from land can occur since there is 'no unqualified constitutional duty on local authorities to ensure that in no circumstances should a

[238] 2007 (6) SA 417 (SCA) para 17. The court was also critical of the court *a quo's* finding in other respects. Specifically, the court referred to the failure of the court *a quo* to indicate whether PIE was applicable in the circumstances. Furthermore, the court *a quo* held that it would be arbitrary to grant an eviction on the basis of section 12(4)(b) of the Building Standards Act, but it did not find that the section was in conflict with section 26(3) and, therefore, unconstitutional.

[239] The court explained that the positive duty is circumscribed in section 26(2), which provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to have access to adequate housing as embodied in section 26(1). Section 26(2) places an internal limit on the ambit of section 26(1). See the court's explanation in *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (6) SA 417 (SCA) para 37.

[240] 2007 (6) SA 417 (SCA) para 37.

[241] 2007 (6) SA 417 (SCA) para 38.

[242] 2007 (6) SA 417 (SCA) para 38.

[243] 2007 (6) SA 417 (SCA) para 39.

home be destroyed unless alternative accommodation or land is made available'.[244] Finally, it requires of the court to consider all relevant circumstances, which 'underlines how non-prescriptive the provision is intended to be'.[245] The court explained that the Constitutional Court has not yet determined the exact meaning of 'relevant circumstances',[246] nor has it confirmed whether a court would have a general discretion to evict once it has considered all the relevant circumstances of the dispute. PIE states in accordance with section 26(3) that all relevant circumstances must be taken into account, and it provides the additional criterion that the eviction must be just and equitable. This indicates that the court's discretion to evict is based on what it deems to be just and equitable. The court would have to consider legally relevant circumstances in instances where the eviction dispute does not fall within the ambit of PIE.[247] Furthermore, section 26(1) and (2) can place a limitation on the right to evict in instances where a state organ seeks an eviction order.[248] The Constitutional Court has confirmed that 'arbitrary' within the context of section 25 of the Constitution means that the law does not provide sufficient reason for the deprivation or that the deprivation is procedurally unfair.[249] Sufficient reason for purposes of section 26(3) will require an evaluation of the means employed

[244] 2007 (6) SA 417 (SCA) para 39. This is part of a quotation from *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 28 and should be read in context. In *Port Elizabeth Municipality* the court continued to state that '[i]n general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme'.

[245] 2007 (6) SA 417 (SCA) para 39 with reference to *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) paras 20-22.

[246] 2007 (6) SA 417 (SCA) para 40.

[247] 2007 (6) SA 417 (SCA) para 40.

[248] 2007 (6) SA 417 (SCA) para 40.

[249] 2007 (6) SA 417 (SCA) para 42, with reference to 'arbitrary' as defined in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

(eviction) and the end sought to be achieved, namely the purpose of the relevant law.[250]

The Supreme Court of Appeal decided that the court *a quo* had failed to recognise that the occupiers did not have a core minimum right, but only a limited right to have access to adequate housing.[251] It was further incorrect of the court *a quo* to find that to deprive the occupiers of their current access to inadequate housing would amount to a violation of their section 26(1) rights.[252] Moreover, the assumption that the courts generally have the discretion to refuse to enforce legislation is rooted in the hypothesis that the PIE discretion has to be read into subsection 12(4)(b) via the Constitution.[253] This assumption is incorrect as it contradicts the authority that binds the court.[254] With reference to the constitutionality of section 12(4)(b), the court explained that section 12(1) enabled the local authority to request of the owner to either demolish his unsafe building, or to alter it so that it no longer constitutes a danger to the public. A section 12(4)(b) notice would only be issued if the owner failed to comply with the 12(1) notice, and if the local authority was of the view that it was necessary to vacate the dangerous building. Accordingly, it could not be said that the ensuing eviction in terms of a court order was arbitrary. The section 12(4)(b) notice would only be issued if continued occupation of an building constituted a safety risk. If a reasonable alternative to eviction was available it should be explored and adopted.[255]

The respondents argued that section 12(4)(b) of the Building Standards Act was unconstitutional because it permitted eviction without a court order. This interpretation was incorrect, and the court explained that the section permitted the

[250] 2007 (6) SA 417 (SCA) para 42.

[251] 2007 (6) SA 417 (SCA) paras 43-45. In this regard, the court explained that the court *a quo* had failed to consider the fact that the city did not have the resources to provide the occupiers with alternative accommodation in the city centre.

[252] 2007 (6) SA 417 (SCA) para 46.

[253] 2007 (6) SA 417 (SCA) para 49.

[254] 2007 (6) SA 417 (SCA) para 49.

[255] 2007 (6) SA 417 (SCA) paras 51-52.

local authority to issue an administrative order to vacate and a criminal sanction in the event of non-compliance with such an order.[256] Section 12(4)(b) did not authorise self-help.[257] The respondents further argued that section 12(4)(b) enabled the eviction of the occupiers in breach of section 26(3) because the relevant circumstances of the case would not be taken into account. This argument, the court pointed out, was incorrect because it was based on the belief that a section 12(4)(b) notice was equivalent to a court order. There is a duty on the local authority to consider all relevant circumstances. However, this duty is an administrative justice requirement and it does not flow from section 26(3) of the Constitution.[258] Furthermore, the *amici* argued that the Building Standards Act was unconstitutional because it does not stipulate that the court must authorise the local authority to issue a section 12(4)(b) notice. The court explained that administrative orders do not require court orders to be valid.[259]

In the court *a quo* the respondents sought the review and setting aside of the city's 12(4)(b) notice on, amongst other things, the grounds of ulterior purpose and

[256] 2007 (6) SA 417 (SCA) para 53.

[257] 2007 (6) SA 417 (SCA) para 53.

[258] 2007 (6) SA 417 (SCA) para 53.

[259] 2007 (6) SA 417 (SCA) paras 54 and 57-61. The court further decided that PIE did not impact on the issuing of a section 12(4)(b) notice. In this regard, the court explained that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) ensured that the issuing of such a notice would comply with the requirements for just administrative action. Moreover, one could infer that the occupiers had the tacit consent of the owners to occupy the buildings. This was so because the buildings had been abandoned by the owners. The inference of consent meant that PIE was not applicable to the dispute.

irrationality.[260] More specifically, this argument was based on the assertion that the applicant was not really concerned with health and safety risks, and that the 12(4)(b) notice had to be viewed with scepticism because of the city's inner-city regeneration scheme.[261] The Supreme Court of Appeal explained that the question of how to avoid or ameliorate unsafe conditions was entirely unrelated to the question of what happened to the buildings once they had been vacated.[262] The court concluded that section 12(4)(b) was not unconstitutional, and that it did not have the discretion to allow an unlawful state of affairs to continue. It further held that the occupiers of the buildings were obliged to comply with the section 12(4)(b) order, even if no alternative housing was made available to them, and even though they would not have access to adequate housing after the eviction.[263]

[260] 2007 (6) SA 417 (SCA) paras 62-64. The respondents further relied on the lack of opportunity to be heard and the city's failure to take relevant circumstances into account. In this regard, the court determined that the right to be heard was embodied in section 3 of PAJA. Furthermore, the fairness of an administrative procedure depended on the circumstances of the case. The court held that the city was entitled to dispense with the hearing requirement, since it was difficult to determine the number of occupiers. The second ground was based on the argument that the city failed to consider the fact that there was no alternative accommodation available to the occupiers. The court explained that this submission presupposed that the section 12(4)(b) notice was dependant on the right of access to adequate housing. This submission was incorrect.

[261] 2007 (6) SA 417 (SCA) para 66.

[262] 2007 (6) SA 417 (SCA) para 67.

[263] 2007 (6) SA 417 (SCA) paras 68-78. However, the court did find that the local government had failed to give due consideration to the needs of the poor. The court held that it was the duty of the city to provide some form of temporary shelter to those who would become homeless as a result of eviction, as required in Chapter 12 of the National Housing Code.

2 3 2 3 Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others (CC) 2008

The Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others*[264] confirmed the Supreme Court of Appeal's finding that the issue of the section 12(4)(b) notice was not dependant or conditional on the right of access to adequate housing.[265] However, it disagreed with the finding that the local authority could issue a section 12(4)(b) notice to vacate, without considering whether alternative accommodation was available to the occupiers.[266] The Supreme Court of Appeal's interpretation of section 12(4)(b) postulated that the fact that a person will become homeless did not have a bearing on the local authority's decision. This approach falsely implied that there was no relationship between section 12(4)(b) and section 26(2) of the Constitution.[267] The Constitutional Court explained that it was imperative for the local authority to not make insulated decisions when performing its various duties. It is expected of the city to balance its duty to eliminate unsafe and unhealthy conditions within its jurisdiction with its duty to provide reasonable access to adequate housing within its available resources.[268] The court further explained that the local authority could not make decisions on these issues separately, and that the housing provisions and safety provision had to be read together.[269] Moreover, it is essential for the municipality – once it has engaged with the occupiers – to make an holistic decision in relation to eviction, which takes into account that people will be rendered homeless, and 'the capacity of the city to do something about it.'[270] The Supreme Court of Appeal failed to fully appreciate the interrelationship between section 12(4)(b) and section 26(2),

[264] 2008 (3) SA 208 (CC). For a discussion of this case, refer to Van der Walt AJ 'Constitutional property law' (2008) 1 *JQR* 2.1, Van der Walt AJ *Property in the margins* (2009) 154-158 and to Liebenberg S *Socio-economic rights: adjudication under a transformative constitution* (2010) 293-303.

[265] 2008 (3) SA 208 (CC) para 43.

[266] 2008 (3) SA 208 (CC) para 43.

[267] 2008 (3) SA 208 (CC) para 43.

[268] 2008 (3) SA 208 (CC) para 44.

[269] 2008 (3) SA 208 (CC) para 44.

[270] 2008 (3) SA 208 (CC) para 44.

and it incorrectly decided that the municipality's failure to consider the homelessness factor was unobjectionable.[271] The Constitutional Court concluded that as part of its decision-making process, the city had to consider the fact that persons would be rendered homeless as a result of a section 12(4)(b) eviction.[272] Consequently, it set aside the eviction order that had been granted by the Supreme Court of Appeal.[273]

The Constitutional Court also decided that section 12(6) of the Building Standards Act was unconstitutional insofar as it made continued occupation of the buildings a criminal offence, even though a court had not ordered the eviction of the occupiers. It explained that section 26(3) of the Constitution had to be interpreted generously, and that it meant that no person could be evicted from his home without a court order.[274] This protective measure would be rendered worthless if persons were compelled to vacate their homes to avoid criminal prosecution. The court explained that the continued occupation of land or buildings could only constitute an offence if a court had granted an eviction order. It agreed that it was necessary to encourage persons to vacate unsafe and dangerous buildings, and a criminal

[271] 2008 (3) SA 208 (CC) para 45.

[272] 2008 (3) SA 208 (CC) para 46.

[273] 2008 (3) SA 208 (CC) para 54. The court held that the Supreme Court of Appeal should not have granted the eviction order because the city had failed to meaningfully engage with the occupiers. In this regard, the court explained that one of the circumstances that a court would have to consider, before evicting people at the instance of the state, was whether there had been meaningful engagement. The court ordered the city to meaningfully engage with the occupiers two days after the leave to appeal against the Supreme Court of Appeal's decision had been granted. An agreement was reached by the parties, which stipulated that the city would temporarily render the buildings safer and more habitable by, amongst other things, installing chemical toilets, cleaning and sanitising the buildings, providing refuse bags and fire extinguishers, and by closing up a lift shaft. It was also agreed that the city would provide the occupiers with suitable alternative accommodation in identified buildings. The accommodation provided to the occupiers was temporary, pending the provision of suitable permanent accommodation, which the city was in the process of developing in consultation with the relevant occupiers. Refer to *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC) paras 9-36, for the court's discussion on meaningful engagement.

[274] 2008 (3) SA 208 (CC) para 49.

sanction did have that effect. Therefore, section 12(6) had to be read to mean that the continued occupation would only constitute an offence once the eviction has been ordered by a court.[275]

2 3 3 The Blue Moonlight Properties cases

2 3 3 1 Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another 2009/2010

The applicant in *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another*[276] sought an eviction order against 62 adults and nine children who occupied its commercial property.[277] These occupiers had resided on the property, which consisted of a factory, an office block and two garages, for about two years.[278] During this time they had continuously paid rent, first to the previous owner of the property, and later to other persons who supposedly collected the money on behalf of the applicant.[279] The applicant purchased the property for redevelopment purposes that would involve the demolition of the existing structures.[280] At the time when it purchased the property, the owner was aware of the fact that it was occupied. However, the applicant insisted that it had not received any form of rent from the occupiers.[281] Subsequently, it instituted eviction proceedings in terms of section 4 of PIE. The

[275] 2008 (3) SA 208 (CC) paras 49-50.

[276] 2009 (1) SA 470 (W). For a discussion of this case, refer to Pienaar JM 'Land reform' (2008) 3 *JQR* 2.4.1. This case was the first hearing and the eviction order was granted by the South Gauteng High Court in *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010). In the latter case the court also awarded constitutional damages to the land owner but this aspect of the judgment was set aside in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA).

[277] 2009 (1) SA 470 (W) para 7. One of the children was disabled and two other occupiers were pensioners.

[278] 2009 (1) SA 470 (W) paras 7-9.

[279] 2009 (1) SA 470 (W) paras 10-15.

[280] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) para 20.

[281] 2009 (1) SA 470 (W) para 17.

buildings were clearly unsuitable to be used for residential purposes as it did not comply with various statutes such as health and safety legislation.[282] The applicant contended that to restore the property to comply with these statutes would not be economically viable, and it urged the court to find a speedy solution as it suffered financially as long as the unlawful occupiers remained on the property.[283] The court decided that it could not even hear the application to evict the unlawful occupiers because the city's housing plan did not accommodate persons who were evicted from private property. In this regard, the court explained that it appeared as if the city was of the view that it was only obliged to assist occupiers that were evicted from public property.[284] It further explained that it would not be able to determine whether an eviction would be just and equitable if it did not have the full assistance and cooperation of the municipality.[285] The court decided to grant the city four weeks to report back on which steps it had taken, and would take in future, to provide unlawful occupiers with emergency shelter in circumstances where they had been evicted from private property.[286]

The city did file a report, albeit not within the time period required by the court, explaining that it would not provide accommodation to persons evicted from private

[282] In *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010), the court explained that the City of Johannesburg had issued the applicant with a warning that the building was dangerous and in violation of certain health and safety by-laws.

[283] 2009 (1) SA 470 (W) paras 9 and 41.

[284] 2009 (1) SA 470 (W) paras 37-40. The court explained that *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) confirmed that the state has a special duty towards persons who have 'no access to land, no roof over their heads and who live in intolerable conditions.' It further explained that the respondents would certainly fall within this category as circumstances had rendered their occupation of the building unlawful. The occupiers would probably have been willing to pay rent to the applicant. Furthermore, they have been in occupation of the building for quite some time and they have made it their home. A court would generally be less willing to evict settled occupiers. These circumstances would have a bearing on the outcome of the application for an eviction order.

[285] 2009 (1) SA 470 (W) para 75.

[286] 2009 (1) SA 470 (W) para 78.

property.[287] As a result, the applicant in *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another*[288] applied for the immediate and unconditional eviction of the unlawful occupiers. Alternatively, the applicant requested the court to evict the occupiers, and to order the city to provide them with accommodation. The applicant further requested the court – in the instance where the eviction could not be granted – to at least provide it with some form of relief that will alleviate the burden caused by the unlawful occupation of its building.[289] This form of relief could include a monetary compensation order against the city. The occupiers brought a substantive application to have the city's housing policy declared unconstitutional on the grounds that it was discriminatory and arbitrary. They requested the court to order the city to rectify its housing policy, and to report back to the court. The occupiers further sought an interdict to prevent the applicant from evicting them until the city could provide suitable alternative accommodation.[290]

The court explained that this case raised the issue of whether private land owners are obliged to indefinitely provide housing for unlawful occupiers or, alternatively, whether this was a duty that should be borne by the city.[291] This issue required of the court to consider the relationship between sections 25 and 26 of the Constitution, and the latter section's implementation in terms of PIE.[292] The court explained that there are two reasons why the right to property is 'an essential foundational stone of a democratic

[287] [2010] ZAGPJHC 3 (4 February 2010) para 31 and 32.

[288] [2010] ZAGPJHC 3 (4 February 2010). For discussion of this case, refer to Pienaar JM 'Land reform' (2010) 1 *JQR* 2.7.

[289] [2010] ZAGPJHC 3 (4 February 2010) para 38.

[290] [2010] ZAGPJHC 3 (4 February 2010) para 38.

[291] [2010] ZAGPJHC 3 (4 February 2010) para 6. A preliminary matter was whether the Gauteng Provincial Government should have been joined as a party to the proceedings. The court explained that the local authority, namely the city, was directly responsible to achieve the progressive realisation of the right to adequate housing in its area of jurisdiction. Moreover, the city had immediate control over 'housing and housing policy within its boundaries and in particular in relation to the attainment of the core rights under section 26 of the Constitution as read with the National Housing Act and the provisions of PIE'. See in this regard [2010] ZAGPJHC 3 (4 February 2010) para 68.

[292] [2010] ZAGPJHC 3 (4 February 2010) para 6.

state'.[293] Firstly, the arbitrary seizure of property without compensation 'strikes at the core of democratic values'.[294] Secondly, during the apartheid era people were stripped of the right to own private and commercial property, which undermined 'the fabric of African society, stunted its economic growth and undermined dignity'.[295] The court further explained that:

> '[t]he right not to be deprived of property, except in terms of law of general application and subject to further limitations, which are always subject to just and equitable compensation is a constitutionally protected right under section 25 of the Constitution'.[296]

Section 26 of the Constitution states that everyone has a right to have access to adequate housing, but this provision does not require private property owners to give up their land to achieve this purpose. The private sector does, however, have an obligation to provide the revenue that will enable the state to perform its section 26 obligations.[297] Furthermore, section 26 does not permit the state to abdicate its responsibilities to provide access to adequate housing on the private sector.[298] The state cannot require the private sector to indefinitely provide unlawful occupiers with accommodation without compensation.[299] Similarly, 'reasonable legislative measures' as envisaged in section 26(2) of the Constitution do not include laws that require property owners to be

[293] [2010] ZAGPJHC 3 (4 February 2010) para 93.

[294] [2010] ZAGPJHC 3 (4 February 2010) para 93.

[295] [2010] ZAGPJHC 3 (4 February 2010) para 93.

[296] [2010] ZAGPJHC 3 (4 February 2010) para 94. The court elaborated that one of the express limitations in the property clause concerns the 'need to acquire privately owned land, subject to compensation' for land reform purposes. The above-quoted passage incorrectly creates the impression that any state interference into property rights necessarily has to be compensated. This is inaccurate since the state is only obliged to compensate owners when it has expropriated property. Other regulatory interferences are uncompensated and constitutional provided that they are imposed by a law of general application and not arbitrary. See Van der Walt AJ *Constitutional property law* 3 ed (2011) 17-19 and the explanation in chapter 5, section *5 1 1 1*.

[297] [2010] ZAGPJHC 3 (4 February 2010) para 96.

[298] [2010] ZAGPJHC 3 (4 February 2010) para 97.

[299] [2010] ZAGPJHC 3 (4 February 2010) para 97.

indefinitely deprived of all uses of their property.[300] Section 26(3) expressly limits the owner's common law rights as it limits his right to evict unless he has obtained a court order.[301] The court reasoned that generally, a land owner's right to immediately evict a person upon default of rental payment is limited.[302] Likewise, a court will have the discretion to temporarily delay the eviction of an unlawful occupier on the basis of PIE. The duration of the delay would depend on the circumstances of the case.[303] Nevertheless, a land owner 'cannot be effectively deprived of his property without adequate compensation' and he ought to retain the right to decide how he would like to use his property.[304] The court explained that in this regard it was bound by precedent, and that it had to follow the Supreme Court of Appeal's reasoning in the *Modderklip*[305] decision. Specifically, the court referred to the Supreme Court of Appeal's finding in that decision, namely that a property owner's right to equality, embodied in section 9(1) and (2) of the Constitution, would be infringed when he is expected to indefinitely bear the state's burden of providing access to adequate housing to unlawful occupiers. The court further explained that it was also bound by the finding that in *Modderklip* the property owner's section 25(1) rights had been breached as a result of the indefinite unlawful

[300] [2010] ZAGPJHC 3 (4 February 2010) para 98.

[301] [2010] ZAGPJHC 3 (4 February 2010) para 99.

[302] [2010] ZAGPJHC 3 (4 February 2010) para 99. In this regard, the court referred to rent control legislation that placed limitations on the landlord's right to evict in certain instances.

[303] [2010] ZAGPJHC 3 (4 February 2010) para 101.

[304] [2010] ZAGPJHC 3 (4 February 2010) para 103.

[305] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).

occupation of its property.[306] On the basis of the Supreme Court of Appeal's finding in *Modderklip*, the court concluded that 'no tier of Government can transfer its constitutional obligations to private citizens on what, realistically, would be an indefinite basis effectively rendering ownership rights nugatory'.[307] It further held that the applicant's right to equality embodied in section 9 was breached insofar as the city's housing plans did not make provision for accommodation of persons who had been evicted from private land.[308] The city's housing plan caused the owner to be deprived of all use of its property, without compensation. Moreover, the owner was precluded from realising its investment through the development of the property. The city adopted a policy that benefits the city to the detriment of the property owner.[309] As to the remedy that should be granted to the property owner, the court held that it is 'inappropriate if not incompetent to direct an expropriation of the applicant's property'.[310] The reason for this was that the court would impose its own solution on the city, which could interfere with broader planning considerations.[311] Both the Supreme Court of Appeal and the Constitutional Court in *Modderklip* confirmed that the payment of constitutional damages, based on the loss of the use of the property, would be a suitable remedy in certain circumstances.[312] In this case the property owner was deprived of its right to use

[306] [2010] ZAGPJHC 3 (4 February 2010) para 107. The court explained that the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) considered it unnecessary to determine whether the Modderklip property owner's section 25(1) rights were infringed. The Constitutional Court did not expressly state that the Supreme Court of Appeal's finding that Modderklip's section 25(1) rights had been infringed was wrong. Accordingly, the court in *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) deemed itself bound by the decision of the Supreme Court of Appeal. The court further referred to the Supreme Court of Appeal's finding in *Modderklip* that section 7(2) of the Constitution imposed a duty on the state to 'respect, protect, promote and fulfil the rights' of the Constitution, even if the damage was caused by third parties.

[307] [2010] ZAGPJHC 3 (4 February 2010) para 135.

[308] [2010] ZAGPJHC 3 (4 February 2010) para 152.

[309] [2010] ZAGPJHC 3 (4 February 2010) para 153.

[310] [2010] ZAGPJHC 3 (4 February 2010) para 159.

[311] [2010] ZAGPJHC 3 (4 February 2010) para 159.

[312] [2010] ZAGPJHC 3 (4 February 2010) para 161.

and develop its property. This was linked to the city's breach of the owner's right to equality, and its failure to draft a reasonable housing programme that would include persons that are evicted from private property.[313] It was also necessary to consider the fact that the city had adopted the attitude that it had no obligation to assist the property owner or the unlawful occupiers.[314] The city appeared to have a sufficient budget to provide emergency or temporary accommodation to unlawful occupiers of private land. Accordingly, the appropriate remedy under the circumstances would be constitutional damages based on the loss of rental income up and until the occupiers were evicted.[315]

The final issue was whether it would be just and equitable to grant the eviction order. In this regard, the court stated that its principal finding was that a property owner could not be required to indefinitely provide housing to unlawful occupiers.[316] It was clear that the continued occupation of the property would, in effect, cause the owner to lose its property.[317] On the one hand the applicant was unable, as a result of the occupation of its building, to obtain any return on its investment for a period of five years. On the other hand the unlawful occupiers were extremely poor and they lived in squalid conditions. These occupiers could not afford to lose their accommodation, nor could they afford to lose any source of income that they might have had.[318] One had to consider the fact that the property owner would obtain a reasonable return on its investment once it had redeveloped the property.[319] Whether the eviction was just and equitable was dependant on the time period afforded to the occupiers to find alternative accommodation. The court was of the view that they would be able to find alternative

[313] [2010] ZAGPJHC 3 (4 February 2010) para 162. The court decided, in relation to the occupiers, that the housing policy also violated their right to equality insofar as it only catered for persons who were evicted from public land. This discrimination rendered the city's housing policy constitutionally flawed, irrational and unreasonable. As a result, the court ordered the city to remedy its defective housing policy. See in this regard, the court's decision in [2010] ZAGPJHC 3 (4 February 2010) paras 144-146 and 196.

[314] [2010] ZAGPJHC 3 (4 February 2010) para 163.

[315] [2010] ZAGPJHC 3 (4 February 2010) para 171.

[316] [2010] ZAGPJHC 3 (4 February 2010) paras 191 and 194.

[317] [2010] ZAGPJHC 3 (4 February 2010) para 190ff.

[318] [2010] ZAGPJHC 3 (4 February 2010) para 190c.

[319] [2010] ZAGPJHC 3 (4 February 2010) para 190d.

accommodation within two months. Accordingly, the court granted the eviction order but postponed its implementation for a period of two months.[320]

2 3 3 2 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another 2011

The Supreme Court of Appeal's findings in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another*[321] is only partially relevant to this discussion, since the major part of the judgment on appeal deals with the local, provincial and national government's section 26(1) and (2) duties as delineated in legislation such as the Housing Act 107 of 1997.[322] However, it is necessary to refer to the court's findings in relation to the constitutional damages ordered by the court *a quo*.

The court held that the unique facts relevant in *Modderklip* 'rendered it distinguishable' from *Blue Moonlight*.[323] In this regard, the court explained that

[320] [2010] ZAGPJHC 3 (4 February 2010) para 195.

[321] 2011 (4) SA 337 (SCA). For a discussion of this case, refer to Van der Walt AJ 'Constitutional property law' (2011) 1 *JQR* 2.1.3.

[322] 2011 (4) SA 337 (SCA) paras 26-48. The court held that the city is directly responsible to progressively realise the right to access to adequate housing in its jurisdiction. It further decided that the court *a quo's* finding that the housing policy discriminated against the occupiers, on the basis that it only provided alternative accommodation to persons who were evicted from public land, was incorrect. In this regard, the court explained that the housing policy only provided for the temporary accommodation for persons who were evicted from land on the basis of section 12(6) of the Building Standards Act. The city did not provide temporary accommodation to persons who were evicted from either public or private land for other reasons. The court explained that it had to determine whether this policy violated the occupiers' right to equality as enshrined in section 9 of the Constitution. It explained that the policy drew an irrational and arbitrary distinction between those occupiers who would receive state assistance and those occupiers who would not. This policy was inflexible as it did not allow for the consideration of the personal circumstances of any of the occupiers. Accordingly, the court held that the policy was unconstitutional as it breached the occupiers' right to equality. See in this regard the court's findings in 2011 (4) SA 337 (SCA) paras 59-69.

[323] 2011 (4) SA 337 (SCA) para 70.

Modderklip 'certainly is not authority for the proposition that constitutional damages are always available, or ordinarily appropriate, as a remedy whenever a fundamental right has been breached'.[324] In *Modderklip* the Supreme Court of Appeal decided that an order for constitutional damages was the only way in which the owner's rights could be protected from excessive state interference. This finding was endorsed by the Constitutional Court. The court explained that *Modderklip* differed from *Blue Moonlight* in four respects. Firstly, the compensation order in *Modderklip* was not ancillary to an eviction order as was the case in *Blue Moonlight*. The Supreme Court of Appeal in *Modderklip* ordered the payment of constitutional damages, since the eviction order granted by the court *a quo* could not be enforced as a result of circumstances beyond the owner's control. Secondly, the compensation order in *Modderklip* was necessary because the state had failed to assist the owner to enforce the eviction order. It was evident that because of the sheer number of occupiers, the owner would have been unable to enforce the eviction order without the assistance of the state. By contrast, there was no indication that *Blue Moonlight* would be unable to evict the 68 occupiers from its property. Thirdly, the number of occupiers in *Modderklip* made it practically impossible for the owner to evict the occupiers. The owner was, in effect, deprived of all economically viable use of his land. *Blue Moonlight* would have the full use and enjoyment of its property once the occupiers were evicted. Finally, *Modderklip* was an innocent victim of land invasion and it did take immediate steps to protect its interests. *Blue Moonlight* purchased its property with the knowledge that the buildings were unlawfully occupied. The court concluded that *Modderklip* was not authority for the granting of constitutional damages in the circumstances. It did, however, order the occupiers to evacuate the buildings on the expiry of a two-month period.[325]

[324] 2011 (4) SA 337 (SCA) para 70.

[325] 2011 (4) SA 337 (SCA) paras 69-72. This two-month period was additional to the two months granted by the court *a quo*.

2 3 4 Conclusion

The *Olivia Road* and *Blue Moonlight* cases show the transformation from apartheid-style evictions and demolitions to a more sophisticated and nuanced approach that seeks to maintain an equilibrium between the duties of the local authority, the rights of land owners, and the interests of unlawful occupiers who may be rendered homeless by eviction. A prominent feature of these cases is that the courts scrutinise disputes about eviction – and by implication demolition – against the backdrop of their social, historical and political context. It is also significant that in the constitutional era anti-eviction legislation imposes extensive duties on local authorities and land owners that are specifically designed to protect the interests of the unlawful occupier. This starkly contrasts with the apartheid-era legislation, which inflated the demolition and eviction powers of local authorities and land owners. Cases like *Olivia Road* and *Blue Moonlight* do not provide neatly packaged solutions to issues such as poverty, unlawful squatting and homelessness but they do to some extent delineate the constitutional and statutory obligations that are imposed on local authorities and private land owners.

Both sets of cases have confirmed that section 26(3) of the Constitution will be the point of departure for all eviction and concomitant demolition disputes. Any action taken by a local authority or a land owner that is related to the eviction from or the demolition of a person's home, must comply with section 26(3). If such an action does not comply with section 26(3), it will be unconstitutional unless it can be justified on the basis of section 36 of the Constitution.[326] This was confirmed by the Constitutional Court in *Olivia Road* when it held that section 12(6) of the Building Standards Act was in violation of section 26(3) insofar as it rendered the continued occupation of a dangerous building a criminal offence in instances where the eviction was not sanctioned by a court.

[326] Section 36(1) of the Constitution stipulates that a right in the Bill of Rights may be limited in terms of a law of general application and only if such limitation is reasonable and justifiable in an 'open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'.

Likewise, *Olivia Road* made it explicit that section 12(4)(b) of the Building Standards Act has to be read in line with section 26(3) of the Constitution. This implies that the local authority must first obtain a court order on the basis of PIE before it can issue a section 12(4)(b) notice. Proof of unhealthy or unsafe circumstances will not necessarily persuade a court to order the eviction of unlawful occupiers. A court will take a range of factors into account, including the personal circumstances of the occupiers and the availability of alternative accommodation. Moreover, a court will also inquire whether there is an alternative to demolition, such as the restoration of the structure for social housing purposes. This is relevant because, in addition to maintaining health and safety standards in urban and peri-urban areas, the local authority is directly responsible to progressively realise the occupiers' right to have access to adequate housing within its jurisdiction. It is expected of local authorities to balance and reconcile their responsibilities, and one can infer from *Olivia Road* that the local authorities' various duties cannot be ranked in order of importance, although in specific circumstances one duty might take precedence. A factor that ought to have a bearing on the local authority's decision to demolish an unsafe or unhealthy building is whether this will result in the unlawful occupiers becoming homeless. The High Court in *Olivia Road* explained that section 26(1) read with (2) of the Constitution does not only mean that the state (and the local authorities) should cultivate an environment where everyone would have access to adequate housing, but also that it will protect and improve houses rather than destroy them. Local authorities must further respect the access to housing that some people have arranged for themselves, even if it is inadequate. The restoration of a dilapidated inner-city structure is an apt example of how the local authority can resolve its health and safety concerns while simultaneously fulfilling its 26 duties. The implication is that courts will be unwilling to grant demolition orders, even when they seem otherwise justified, when doing so would deprive the occupiers of access to housing that they have at the moment and render them homeless.

The series of *Blue Moonlight* decisions made it clear that the local authority cannot shift their section 26(1) and (2) duties onto private land owners. It remains the local authorities' responsibility to provide access to adequate housing to the unlawful

occupiers of private land and buildings. Both *Blue Moonlight* and *Olivia Road* confirmed that it is imperative for local authorities to develop a housing policy or scheme that would cater for evictees. The respective courts in *Olivia Road* and in *Blue Moonlight* were reluctant to order the occupiers to vacate the properties because the city's deficient housing policy did not provide alternative housing to those occupiers upon eviction. The lack of an adequate housing policy ultimately extends the burden placed on land owners who seek the eviction of unlawful occupiers from their land. This burden has the potential to amount to an arbitrary deprivation of the land owners' property. The city's ineptitude could further exacerbate deteriorating health and safety standards in the inner city. Occupiers move into overcrowded and decrepit urban buildings because they cannot access alternative housing. It is, therefore, clear that by not developing a suitable housing policy, the city shuns its section 26(1) and (2) responsibilities, and it indirectly contributes to those unhealthy and dangerous inner-city circumstances that it is compelled by law to prevent.

Blue Moonlight and *Olivia Road* indicate that land owners have a range of obligations in relation to their inner-city structures. Firstly, a land owner has a statutory duty to maintain his building and to ensure that it does not pose a health or safety risk to any member of the public. Secondly, a land owner has the concomitant duty to ensure that his building is not unlawfully occupied. The reason for this is that the unlawful occupation of a structure can contribute to the general decay of the building. Furthermore, *Blue Moonlight* has shown that there is an obligation on the owner to temporarily tolerate unlawful occupiers until they are evicted from his property. This obligation is imposed on land owners by the courts that have the discretion to postpone the eviction of occupiers on the basis of PIE. The duration of the delay will depend on the unique circumstances of the case. Factors that will play a role in the court's decision include the duration of the occupation, the personal circumstances of the occupiers and the circumstances under which the building became unlawfully occupied. *Olivia Road* confirmed that the courts would be less inclined to order the eviction of established occupiers. One can further assume that a court will be wary to evict occupiers whose occupation of the building became unlawful as a result of changed circumstances, as was the case in *Blue Moonlight.* By contrast, a court might more readily evict occupiers

who cynically took possession of a vacant property. Another relevant factor would be where, as in *Modderklip*, the owner actively attempted to evict the occupiers from his property, as opposed to an owner who ignored the fact that his building was unlawfully occupied. A court would also consider the nature of the building; the owner's intended use of the building and the degree to which the unlawful occupation of the structure interfered with his investment-backed expectations. The industrial building in *Blue Moonlight* was not suited to any form of residential use, and the fact that it was unlawfully occupied interfered with the owner's plans to demolish the structures and to develop the property. A court will also give consideration to the extent to which the building poses a threat to occupiers and to the public in general. Factors such as the personal circumstances of the occupiers and the availability of alternative accommodation will also be taken into account.

It is only once the court has considered all these (and other) circumstances that it will be able to ascertain whether it would be just and equitable to order the eviction of the occupier. This approach does not automatically prefer ownership over the rights of the occupier. Nevertheless, there will be instances where, as in *Modderklip*, a court will find that it cannot evict the occupiers even though the unlawful occupation of the structure places an excessive burden on the land owner. In such instances it might be necessary for a court to order the local authority to pay the owner an amount that would to some extent alleviate this burden. This amount is similar to what is known in the

German legal system as *Ausgleich* or equalisation measures.[327] Such a payment should not be confused with the payment of delictual damages or with compensation for an expropriated property. It is rather a measure to mitigate the burden that is imposed on the owner by legislation and enforced in the public interest. The authorising legislation should make provision for such a measure, and should describe the specific circumstances when a court would be able to grant this remedy. Judging from the *Blue Moonlight* decision, it seems as if the courts are moving toward accepting that there is a need for a remedy that is akin to the German equalisation measures, but perhaps find it difficult to determine when such a payment is required. There are two reasons why such a development is desirable. Firstly, a court does not have the authority to order expropriation if it finds that the unlawful occupation of a building places a disproportionate burden on the owner. Secondly, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was enacted to protect both the rights of owners and occupiers. PIE does not currently cater for situations where it would not be just and equitable to evict but where it is also unreasonable to allow the continued occupation of the property. The inclusion of an equalisation measure in PIE will prevent the imposition of disproportionate burdens on the owner. This in turn will prevent future constitutional challenges on the basis that PIE imposes an arbitrary deprivation of property. Such a remedy would only be available in exceptional instances

[327] Van der Walt AJ *Constitutional property law* 3 ed (2011) 277-282 and 366-367 explains that the German law equalisation measure does not amount to compensation for expropriation. It is designed to 'soften' the impact of the burden that is placed on owners by legislation. Such a payment ensures that the burden is not rendered invalid because it is excessive on the basis of the proportionality principle. Van der Walt explains that the award granted by the Supreme Court of Appeal in *Modderklip* is comparable to this equalisation measure. He further explains that an owner might have to be compensated when anti-eviction legislation prevents him from obtaining an eviction order in circumstances where he otherwise would have been entitled to such an order. See further Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 42-47 and Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 236-239. Equalisation measures are discussed in greater detail in chapter 4, section *4 5 2 2* and in chapter 5, section 5 3 2 and section 5 4 2 *2*.

and should not be considered a general solution to each instance where property rights are infringed.

Finally, it will also be beneficial for the local authority if provincial or national legislation could be developed to address the issue of problem buildings in urban areas. This legislation should clearly delineate the owner's duties in relation to the maintenance of the building. Owners should further be compelled to take active steps to prevent buildings from becoming unlawfully occupied.[328] Such legislation should further make provision for the expropriation of buildings in instances where it would be impractical to evict the occupiers. More importantly, this legislation can even include a provision that would enable the forfeiture of buildings that have been ostensibly deserted by the owner. These buildings could be integrated into the city's housing scheme.

The effect of the developments described above is that it has become increasingly difficult to obtain demolition orders as a direct result of the anti-eviction provision in section 26(3) of the Constitution, the anti-eviction legislation developed in terms of it (especially PIE) and the interpretation and application of those provisions in case law.

2 4 Conclusion

This chapter shows how private land owners' and local authorities' demolition and eviction powers were employed to further the apartheid ideal of a racially segregated society. Apartheid legislation such as PISA created demolition and eviction powers that far exceeded owners' rights under the common law as they were authorised to demolish structures that were erected or occupied without their consent, even though they had not obtained a court order. Similar powers were afforded to local authorities in relation to buildings that were erected or occupied without private land owners' consent. PISA

[328] Similar legislation was operative in the Netherlands to discourage land owners from allowing their buildings to become unlawfully occupied. See in this regard Van der Walt AJ 'De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip: een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerende goed en dakloosheid' (1991) 17 *Recht en Kritiek* 329-359. Refer to chapter 6, section 6 5 3, footnote 142 for a brief discussion of the Leegstandwet 1986.

also justified evictions and demolitions on the basis of health, safety and planning regulations. Land owners and local authorities were compelled to demolish buildings that were erected without building plans and these structures were often occupied by marginalised black people who could not afford alternative accommodation. Furthermore, PISA notoriously ousted the jurisdiction of the courts to hear demolition disputes, unless the unlawful occupier could prove that he had a right or a title to the land and that his house was demolished in bad faith. This meant that most demolitions and evictions occurred without judicial oversight.

Homelessness and the unlawful occupation of land, two of the biggest socio-economic problems currently in South Africa, can in part be ascribed to apartheid evictions and demolitions. More specifically, demolition greatly depleted the housing stock, and it destroyed the community networks that often supported poor black South Africans. Fortunately, the constitutional era has introduced a remarkably different approach to resolving eviction and demolition disputes. Two constitutional provisions are relevant in eviction disputes concerning the unlawful occupation of private land. Firstly, section 25(1) of the Constitution, which expressly recognises that ownership, and especially the ownership of land, can be regulated in the public interest. This aspect of section 25(1) confirms that ownership is not an absolute right. Section 25(1) further proscribes state interferences that are not imposed in terms of law of general application, or that result in an arbitrary deprivation of property. Regulatory laws, such as anti-eviction legislation, must meet these two requirements to be constitutional. Essentially, section 25(1) indicates that in addition to entitlements that they have in relation to their land, property owners have certain obligations towards their community. Secondly, section 26(3) of the Constitution prohibits the eviction from, or the demolition of, a home without a court order. Section 26(3) also proscribes arbitrary evictions. PIE repealed PISA and it was enacted to give effect to section 26(3) of the Constitution. PIE achieves this by enabling the courts to delay evictions if, after considering all the relevant circumstances, they find that it is neither just nor equitable to order evacuation of the property. Importantly, PIE makes eviction subject to certain procedural and substantive requirements. The substantive requirements draw the court's attention to factors such as the personal and social circumstances of the occupier, the political

events that contributed to poverty and homelessness, and even the age of the occupier or whether he is disabled.[329]

In *Port Elizabeth Municipality v Various Occupiers*[330] the Constitutional Court explained that when deciding eviction disputes it could not automatically preferance the land owner's rights over the rights of the unlawful occupiers. Rather, it is necessary for a court to balance and reconcile the opposed claims once it has taken all the relevant circumstances into account.[331] This may mean that there will be instances where the court will not order the immediate eviction of occupiers from private land. However, *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another*[332] established that the state cannot abdicate its section 26 housing duties and shift them onto the private land owner. The implication is that it cannot be expected of the land owner to bear the burden of the indefinite unlawful occupation of his land. There should be a way to protect property rights in circumstances where it is not just or equitable to order the eviction of the occupiers or to allow the continued occupation of land. It is imperative to develop a statutory remedy that would enable the courts to better protect the rights of both the occupiers and private land owners.

Finally, *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others*[333] made it explicit that local authorities' health and safety duties cannot automatically take precedence over 26(3) rights. Moreover, local authorities cannot perform health and safety duties in isolation from their duty to provide access to adequate housing. The practical effect of this judgment is that the existence of unhealthy and unsafe circumstances will not necessarily persuade a court to grant an eviction order. There will also be circumstances where local authorities would have to restore, rather than demolish unhealthy or dangerous buildings. In so doing, the local authorities will meet their health

[329] Van der Walt AJ *Property in the margins* (2009) 149.

[330] 2004 (12) BCLR 1268 (CC).

[331] 2004 (12) BCLR 1268 (CC) para 23.

[332] [2010] ZAGPJHC 3 (4 February 2010).

[333] 2008 (3) SA 208 (CC).

and safety obligations as well as their constitutional obligations pertaining to social housing.

As explained above, case law does not provide crystal clear solutions to eviction and demolition disputes. However, decisions such as *Olivia Road* and *Blue Moonlight* show that in the constitutional era there is an increased emphasis on the value that a person ascribes to his home. Furthermore, courts will not automatically prefer ownership or the statutory duties of local authorities over and above section 26(3) rights. There are instances where ownership will – at least temporarily – have to yield to the rights of unlawful occupiers. This is an obligation that accompanies the ownership of land in the constitutional era. Likewise, local authorities are expected to reconcile their various responsibilities. These responsibilities include their section 26(1) and (2) housing duties; their duty to protect property rights in certain instances and their other statutory responsibilities.

Chapter 3:
The demolition of illegal building works

3 1 Introduction

It is generally presumed that the courts are reluctant to grant orders for the demolition of especially valuable buildings.[1] This presumption was made explicit in a body of encroachment cases decided by the South African courts.[2] The essence of these decisions is that in encroachment cases, the courts have the discretion to order the removal of the encroaching building or structure. In the case of *Higher Mission School Trustees v Grahamstown Town Council*,[3] the court ordered the demolition of the encroaching structure. Sampson J concluded his judgment by stating that he wished to safeguard himself from being understood to

> 'hold without further argument that in a case where an extensive building has been erected at great expense partly upon land of little value belonging to a third party, the Court will be bound to order the removal of the encroachment even if it be established that the encroachment was made in ignorance'.[4]

[1] Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 34.

[2] Building encroachments are excellent examples of illegal building works that can justify the granting of demolition orders. However, case law indicates that the courts are reluctant to order the demolition of encroaching structures in certain instances. This chapter does not discuss building encroachments in detail because this topic has recently been discussed elsewhere. See Temmers Z *Building encroachments and compulsory transfer of ownership* unpublished LLD thesis Stellenbosch University (2010), Van der Walt AJ *The law of neighbours* (2010) 132-203, Van der Walt AJ 'Replacing property rules with liability rules: encroachment by building' (2008) 125 *SALJ* 592-628, Pope A 'Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles' (2007) 124 *SALJ* 537-556, O'Conner P 'The private taking of land: adverse possession, encroachment by buildings and improvement under mistake' (2006) 33 *Univ of Western Australia L Rev* 31-62 and O' Conner P 'An adjudication rule for encroachment disputes: adverse possession or a building encroachment statute?' in Cook E (ed) *Modern studies in property law* IV (2007) 197-217.

[3] 1924 EDL 354. Refer to Van der Walt AJ *The law of neighbours* (2010) 146 for a discussion of this case.

[4] 1924 EDL 354 at 366.

Similarly, after the court in *De Villiers v Kalson*,[5] considered English as well as South African case law, it concluded that it could not find authority for the view that 'under no circumstances can the court exercise such a discretion'.[6] Accordingly, the court ordered the payment of monetary compensation instead of the removal of the building works. In exercising its discretion, the court took into account that the cost of the removal of the building would be excessive compared to the harm suffered by the plaintiff.

In *Rand Waterraad v Bothma en 'n ander*[7] the court also ordered the respondent to pay compensation instead of removing the encroaching structures. The court explained that it has previously been assumed that the courts have a discretion to order the payment of damages in encroachment cases, although this point had never been decided by the courts. Consequently, the court set out to trace the historic origin of the discretion to order compensation instead of demolition in encroachment cases. It concluded that the discretion to order compensation is based on the ground of fairness.[8] With reference to the old authorities, the court held that fairness could be the foundation for the creation of a legal rule that sets out to resolve conflicting interests in a neighbour law relationship.[9] A constant normative value can be ascribed to the principle of fairness, namely that in instances where a person causes harm to his neighbour, he has a duty to bear some of the harm. Fairness implies that a person must share in the harm that he caused his neighbour to bear.[10] The court concluded that fairness, as an established legal rule, was recognised in the common law and that it was applicable in

[5] 1928 EDL 217.

[6] 1928 EDL 217 at 231.

[7] 1997 (3) SA 120 (O). Refer to Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 34 and Van der Walt AJ *The law of neighbours* (2010) 146-149 for a discussion of this case.

[8] 1997 (3) SA 120 (O) 132H-J. In this regard the court referred to arguments raised in relation to the English law principle of equity. The gist of these arguments was that it was incorrect for South African courts to rely on equity as intended in the English law, and that it could only be applied in accordance with the principles enunciated in Roman-Dutch law.

[9] 1997 (3) SA 120 (O) 136B-C.

[10] 1997 (3) SA 120 (O) 136C-D.

the context of the unique neighbour law relationship.[11] Fairness dictated that prejudice had to be distributed equally and that both neighbours should be held accountable for the harm.[12]

The findings in *Rand Waterraad v Bothma en 'n ander* were later confirmed in *Trustees of the Brian Lackey Trust v Annandale*.[13] In that case the court held that it had a wide equitable discretion to order the payment of monetary compensation in encroachment cases, even if the encroachment was not small or trivial.[14] However, such a discretion is not completely unfettered. The court held that the primary remedy for encroachment cases is the demolition of the encroaching building, but added that rigid enforcement of the remedy could lead to unjust results.[15] It is for this reason that the court has the discretion in certain circumstances to order the payment of compensation instead of removal.[16] The court stated that, in exercising its discretion, it had to take cognisance of the fact that the courts have a natural aversion to the demolition of valuable buildings.[17]

Van der Walt explains that the series of encroachment decisions created the impression that the courts are unwilling to grant demolition orders (even in the instance of illegal buildings) if the buildings are valuable, and if demolition will result in great loss to the builder. He argues, with reference to recent case law, that this impression is wrong and that the courts are in fact willing to demolish unlawful as well as illegal buildings.[18] In this context, buildings can be described as unlawful when they infringe upon the vested or acquired property rights of others and illegal when they have been erected in direct contravention of statutory prescriptions or requirements. A building that encroaches upon neighbouring land is therefore unlawful to the extent that it infringes

[11] 1997 (3) SA 120 (O) 138C-D.

[12] 1997 (3) SA 120 (O) 138E.

[13] 2004 (3) SA 281 (C).

[14] 2004 (3) SA 281 (C) para 30.

[15] 2004 (3) SA 281 (C) para 32.

[16] 2004 (3) SA 281 (C) para 32.

[17] 2004 (3) SA 281 (C) para 38.

[18] Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 35.

upon the neighbour's land, but it can also be illegal to the extent that it was erected in the absence of, or contrary to, approved building plans as required by applicable legislation.

This chapter firstly refers to cases where the courts ordered the demolition of unlawful structures and in particular, structures that were built in conflict with restrictive conditions. Secondly, the chapter refers to cases where the courts ordered (or considered the possibility of ordering) the demolition of illegal structures. The second part of the chapter specifically refers to structures that were built without buildings plans and in blatant disregard of statutory provisions or requirements and, further, to structures that were built in accordance with building plans that were set aside on review. Illegal structures therefore comprise of structures that were built without building plans and that conflict with other relevant statutory provisions, such as environmental conservation legislation and, further, of buildings that were built on the basis of building plans that was subsequently set aside on review. In this regard the emphasis falls on the right of neighbouring land owners to have illegal buildings and building works demolished. Finally, this chapter determines the instances where the courts would be reluctant to order the demolition of an illegal structure.

This chapter uses the terms 'building' and 'building works' interchangeably. Both terms are relevant in this chapter, depending on the unique factors of a specific building dispute. 'Buildings' refers to entire structures and 'building works' refers to parts of buildings or smaller structures such as walls or balconies. Finally, for purposes of this chapter 'neighbouring land owners' refers to land owners in the same township (neighbouring land owners in the broad sense) and not to owners of adjacent plots of land (neighbouring land owners in the narrow sense). Where necessary, the chapter specifies where a specific legal rule or principle will only apply to neighbouring land owners in the narrow sense.

3 2 Obtaining a demolition order in instances where restrictive conditions are breached

3 2 1 General background: restrictive conditions

The section below provides a brief background to conditions of title and restrictive covenants which forms part of the broader category of restrictive conditions. This distinction is important because, even though the practice of creating restrictive covenants has been abolished,[19] it is still possible for plaintiffs to enforce restrictive covenants registered against the title deeds of their properties. However, this chapter refers to more recent case law concerning the strict enforcement of conditions of title by way of demolition orders.[20] Nevertheless, the same line of reasoning adopted in these decisions applies equally in the instance of restrictive covenants as described below. Accordingly, the chapter refers to restrictive conditions as the overarching term and where necessary, it indicates the relevant differences or similarities between restrictive covenants and conditions of title.

Badenhorst, Pienaar and Mostert divide restrictive conditions into the subcategories of restrictive covenants and conditions of title. They explain that even though the origins of these conditions differ, their effect on ownership remains the same in that both types of condition place a limitation on the exercise of ownership entitlements.[21] Van Wyk also draws a distinction between restrictive covenants and conditions of title and points out that the courts have in the past confused the two

[19] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 133 explains that the practice of inserting conditions into title deeds came into being when developers entered into agreements (restrictive covenants) with the purchasers of erven in newly established townships. At the turn of the century, this practice was taken over by legislation which authorised the insertion of conditions (conditions of title) into the title deeds of land.

[20] *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape, and others* 2001 (4) SA 294 (C) 324E-J; *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE); *Van Rensburg NO and another v Equus Training and Consulting CC and another* [2009] ZAECPEHC 50 (25 September 2009) and *Van Rensburg NO v Naidoo NO* [2010] ZASCA 68 (26 May 2010).

[21] Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* 5 ed (2006) 345.

concepts.[22] According to Van Wyk, the English law concept of restrictive covenants was first introduced into South African law during the latter half of the 19th century to regulate township establishment.[23] Restrictive covenants are non-statutory limitations on the use of land, created by way of an agreement between the township owner and purchasers, for the purpose of protecting the unique character of the area.[24] This type of agreement creates mutual benefits for all the property owners in the township[25] and it becomes binding on other third parties once it is registered against the title deeds of the

[22] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 57; Van Wyk J *Planning law: principles and procedures of land-use management* (1999) 16-17; Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 271-272, 279.

[23] Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 271.

[24] Van Wyk J *Planning law: principles and procedures of land-use management* (1999) 16. Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 80-85 and 93 explains that restrictive covenants are based on the construction of a contract for the benefit of a third party. The elements of this contract emanate from the English decision *Elliston v Reacher* (1908) 2 Ch 374. In *Elliston v Reacher* the court listed four requirements to determine whether the limitations on the use of land were imposed to the benefit of all the owners in the township. The requirements are, firstly, that both the defendant and the plaintiff must have obtained ownership of their land from a common vendor. Secondly, prior to selling the plots, the original township owner must have laid out erven that were subject to restrictions in accordance with a general scheme of development. Thirdly, the original township owner must have created these restrictions with the intention that they benefit all other erven in that township. Finally, the defendant and the plaintiff (or predecessor in title) must have purchased their properties with the understanding that the restrictions were for the benefit of all the other properties in the township. Van Wyk further explains that these principles were adopted into South African law and that they were often employed as a guide to determine whether a contract for the benefit of a third party had been created.

[25] This agreement can also be concluded for the sole benefit of the township owner. Such an agreement is of a personal nature and it can only be enforced by the township developer and not by other owners in the township. See Pienaar JM *Die regsaard van beperkende en dorpstigtingsvoorwaardes* unpublished LLM thesis PU for CHE (1990) 36-37.

properties.[26] Restrictive covenants are converted into limited real rights *sui generis* once they have been registered.[27]

Conditions of title are the statutory successors of restrictive covenants. Legislation in the form of the provincial township ordinances was enacted to enable the administrators of the provinces to create and register conditions of title.[28] Conditions of title can be interpreted in a broad or in a narrow sense. In the broad sense, conditions of title are all limitations that can be placed on ownership or title.[29] This chapter considers case law concerning the enforcement of conditions of title in the narrow sense, namely conditions that were statutorily created and inserted into the title deeds of properties,

[26] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 111. Restrictive covenants can be removed from the title deeds of properties by way of agreement, an application to a court or in terms of the Removal of Restrictions Act 84 of 1967. It is impractical to remove a restrictive covenant by way of an agreement if it is registered against the title deeds of a number of properties. The reason for this is that the consent of each owner will have to be obtained. The Deeds Registries Act 47 of 1937 enables land owners to cancel restrictive covenants by a notarial deed that is registered, once all the parties have agreed to remove that covenant. See Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 255-257.

[27] Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 288, and to the same effect Van Wyk J *Planning law: principles and procedures of land-use management* (1999) 17. Van Wyk explains that the courts and some authors have incorrectly classified restrictive covenants as either praedial or personal servitudes. She provides doctrinal reasons as to why restrictive covenants should not be classified as servitudes. See Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 99-105 and Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 281-287.

[28] Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 271-272, 279. One of the fundamental differences between restrictive covenants and conditions of title is that the latter are created in the public interest.

[29] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 57. According to Van Wyk, the term 'conditions of title' in the wide sense refers to all conditions, regardless of whether they are inserted into the title deed of properties or not, namely town planning conditions, restrictive covenants, servitudes and conditions of title (proper).

normally upon establishment of a new township.[30] Van Wyk explains that conditions of title are one of two main tools to regulate the use of properties in a township, the other being zoning or town-planning schemes.[31] It is generally accepted that the purpose of conditions of title is to ensure the preservation of the character of a neighbourhood.[32] They are further designed to assist in the 'creation of a coordinated and harmonious layout' of townships to the benefit of all the property owners in the area.[33] Conditions of title are created in the public interest.[34]

[30] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 27-32 and 53 explains that conditions of title in the narrow sense are usually applied in the context of the various town planning ordinances. Town planning ordinances that are still in operation include the Land Use Planning Ordinance 15 of 1985 (applicable in the area of the Western Cape); Townships Ordinance 9 of 1969 (applicable in the Free State) and the Town-planning and Townships Ordinance of 1986 (created for use in the area of the then Transvaal). These ordinances contain provisions in terms of which conditions can be created and imposed on new townships. The Town Planning Ordinance 27 of 1949 (created for use in the then Natal) has been repealed by the KwaZulu-Natal Planning and Development Act 6 of 2008.

[31] Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 660.

[32] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 135; Van Wyk J 'Removing restrictive conditions and preserving the residential character of a neighbourhood' (1992) 55 *THRHR* 369-385 at 372; Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 660.

[33] Van Wyk J 'Removing restrictive conditions and preserving the residential character of a neighbourhood' (1992) 55 *THRHR* 369-385 at 372.

[34] Van Wyk J 'Removing restrictive conditions and preserving the residential character of a neighbourhood' (1992) 55 *THRHR* 369-385 at 372.

South African law distinguishes between personal and praedial servitudes.[35] Likewise, a distinction is drawn between personal and praedial restrictive conditions.[36] A personal restrictive condition is created for the benefit of the original township developer or owner. Upon registration, a praedial restrictive condition creates reciprocal obligations and mutual benefits for all the properties situated in the township.[37] Praedial restrictive conditions are only registered against the title deed of the servient tenement and not against the title deed of the dominant tenements. Accordingly, there is often uncertainty as to who benefits from such a restrictive condition. Pienaar suggests that this manner of registration is a result of the fact that restrictive conditions are considered to be a unique form of servitude.[38] By contrast, Van Wyk has convincingly argued that conditions of title and restrictive covenants have erroneously been forced into the

[35] Praedial servitudes are registered over a piece of land (the servient tenement) for the benefit of a person in his capacity as the owner of the dominant tenement. Praedial servitudes are limited real rights and they are transferable since they can be enforced by the owner, or any subsequent owner, of the dominant tenement. Personal servitudes, by contrast, can be registered over either movable or immovable property and they grant certain entitlements to a specific person in his personal capacity. Personal servitudes are limited real rights, but they are not transferable. See Van der Merwe CG *Sakereg* 2ed (1989) 459-461, Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* 5 ed (2006) 321-322 and Van der Walt AJ and Pienaar GJ *Introduction to the law of property* 5 ed (2006) 233-238.

[36] Pienaar JM *Die regsaard van beperkende en dorpstigtingsvoorwaardes* unpublished LLM thesis PU for CHE (1990) 36. Pienaar uses the term restrictive conditions or '*beperkende voorwaardes'* but does not specifically distinguish between conditions of title and restrictive covenants. Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 271-272 explains that the courts and some authors have failed to recognise the difference between restrictive covenants and conditions of title. These are two entirely different concepts since the former is created in terms of an agreement within a specific context, and the latter is created in terms of legislation.

[37] Pienaar JM *Die regsaard van beperkende en dorpstigtingsvoorwaardes* unpublished LLM thesis PU for CHE (1990) 37.

[38] Pienaar JM *Die regsaard van beperkende en dorpstigtingsvoorwaardes* unpublished LLM thesis PU for CHE (1990) 38.

servitude mould.[39] She provides cogent reasons as to why these restrictive conditions should rather be categorised as limited real rights *sui generis*.[40] Case law has confirmed that the limited real rights created by conditions of title and restrictive covenants amount to constitutional property for purposes of section 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution).[41]

When it comes to enforcement, restrictive conditions take precedence over the provisions of a zoning scheme.[42] Moreover, a local authority cannot consent to the use of property in contravention of restrictive conditions.[43] It is imperative for property owners to first remove such conditions from their title deeds before they can proceed to build in a manner that would be prohibited by that condition. Van Wyk argues that planning tools, such as conditions of title, have existed for more than a 100 years and that they have an important function insofar as they promote the orderly development of towns and residential areas.[44] Many property owners have simply ignored restrictive conditions, and in particular, conditions of title registered against the title deeds of their properties. Unfortunately, it has also become general practice for some municipalities to

[39] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 99-106 and 144-152, and to the same effect, Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288. Van Wyk provides doctrinal reasons why conditions of title should not be classified as servitudes.

[40] See in the regard Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 153 and to the same effect Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 288.

[41] *Ex Parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) para 19.

[42] *Malan v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) 40E; *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape, and others* 2001 (4) SA 294 (C) 325A and *Van Rensburg NO v Nelson Mandela Metropolitan Municipality* 2008 (2) SA 8 (SE) 10J.

[43] *Enslin v Vereeniging Town Council* 1976 (3) SA 443 (T) 447A-D; *Malan v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) 40E-F and *Van Rensburg NO v Nelson Mandela Metropolitan Municipality* 2008 (2) SA 8 (SE) 11A-B.

[44] Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 662.

consent to the use of property in blatant disregard of restrictive conditions.[45] Van Wyk reasons that planning tools such as conditions of title will only be able to stave off illegal developments if there are effective remedies such as a demolition order available.[46] Recent case law has confirmed that conditions of title fulfil a unique function as a planning tool that cannot be replaced by zoning schemes.[47] Furthermore, the courts have called on the local authorities to enforce compliance with restrictive conditions.[48] Together, these decisions indicate the circumstances under which the courts will apparently enforce strict compliance with restrictive conditions by ordering demolition of unlawful building works if necessary.

[45] Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 660. In *Kotze v Haldon Estates (Edms) Bpk en andere* [2010] ZAFSHC 102 (23 September 2010) 19, the court confirmed that an individual could not relinquish a public rights such as those created by a condition of title or registered servitude. In this case the court had to determine whether the municipality had waived its right to enforce compliance with a restrictive condition. The court held that the condition was registered against the title deed of the first respondent's property and that the municipality was not the only beneficiary of the condition. Accordingly, the municipality could not abdicate its duty to enforce compliance with the condition.

[46] Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 662.

[47] *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape, and others* 2001 (4) SA 294 (C) 324E-J; *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE) para 8; *Van Rensburg NO and another v Equus Training and Consulting CC and another* [2009] ZAECPEHC 50 (25 September 2009) and *Van Rensburg NO v Naidoo NO* [2010] ZASCA 68 (26 May 2010) paras 34-37.

[48] *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE) para 1 and Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 662. Van Wyk explains that *Van Rensburg v NMMM* highlights the fact that conditions of title have a private as well as a public-law aspect. The private-law aspect relates to the relationship between the neighbours and the owner that contravenes conditions of title, whereas the public-law aspect relates to the relationship between the owner, the neighbours and the local authority that must enforce conditions of title. She argues that the court's emphasis on the public-law aspect of conditions of title indicates that there is a duty on municipalities to act in accordance with such conditions.

3 2 2 Enforcement of restrictive conditions: mandatory and prohibitory interdict

The courts enforce compliance with a condition of title and restrictive covenants either by way of a prohibitory interdict,[49] a mandatory interdict,[50] or a combination of both.[51] Usually, the courts will grant a prohibitory interdict to prevent the continuance of unlawful activities in contravention of the condition of title. The applicants would then apply for a demolition order by way of a mandatory interdict.

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[49] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 210-214. Van Wyk explains that the courts may either grant an interim interdict or a final interdict. The requirements for an interim prohibitory interdict are: (a) a clear or a *prima facie* right; (b) the apprehension of irreparable harm; (c) a balance of convenience in favour of the granting of an interdict and (d) no alternative remedy is available. See in this regard *Setlogelo v Setlegelo* 1914 AD 221 at 227; *Gool v Minister of Justice* 1955 (2) SA 682 (C) 688; *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 758 (N) 772 and *Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) 691C-F. The requirements for a final prohibitory interdict are: (a) the applicant must be able to prove, on a balance of probabilities, that he has a clear right; (b) actual injury committed or reasonable apprehension of harm and (c) no alternative remedy is available. The requirements for a final interdict have been set out in *Setlogelo v Setlegelo* 1914 AD 221 at 227 and they have been applied consistently by the courts. See for example *Diepsloot Residents and Landowners Association v Administrator, Transvaal* 1993 (3) SA 49 (T) 60B-C and 1994 (3) SA 336 (A) 344; *Knox D'Arcy Ltd and others v Jamieson and others* 1995 (2) SA 579 (W) 592H-593C and *Sanachem (Pty) Ltd v Farmers Afri-Care (Pty) Ltd and others* 1995 (2) SA 781 (A) 789B-D. The requirements for a mandatory interdict (a demolition order) are the same as for a final prohibitory interdict.

[50] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume II 5 ed (2009) 1454-1455 explain that a mandatory interdict compels a person to do something so as to avoid injustice and hardship. A mandatory interdict also has the purpose of remedying the effects of unlawful action that has already been taken. Litigants will apply for a mandatory interdict if other remedies are not available or where the delay resulting from the use of other remedies will cause irreparable harm.

[51] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 210-216 explains that damages, instead of an interdict, can be awarded in limited circumstances. The circumstances are (a) if there is a minor infringement on the rights of the plaintiff; (b) a monetary value can be linked to the infringement; (c) the injury suffered by plaintiff can be compensated by way of a money payment; and (d) if the granting of an interdict is oppressive to the defendant.

In *PS Booksellers v Harrison*[52] the applicants applied for an urgent interdict restraining the respondents from continuing with construction works in contravention of conditions of title and of the provisions of the zoning scheme. In support of their application, the applicants argued that it would be more difficult to obtain a demolition order once the respondent's building was completed.[53] The situation would be exacerbated if the property, together with the completed building works, was sold to an unknowing third party. The applicants argued that it would be even more difficult to obtain a demolition order against a *bona fide* purchaser, especially if the said purchaser was a foreigner.[54] With reference to the grounds set out above, the applicants concluded that irreparable harm would follow if the court did not grant the urgent interdict. As will be shown below, these arguments now lack substance in light of the findings in the *Van Rensburg* decisions.[55]

In the series of *Van Rensburg* decisions the respective courts had to determine whether they should order the demolition of buildings that had been built in blatant disregard of conditions of title. In *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* (*Van Rensburg v NMMM*),[56] the applicants (the Hobie Trust) sought and obtained a demolition order with regard to works built by the

[52] 2008 (3) SA 633 (C).

[53] Similar arguments were made in *Van der Westhuizen v Butler* 2009 (6) SA 174 (C) 177A-G. In this case the applicants applied for an urgent interdict prohibiting the respondent from continuing with construction on the property pending the outcome of a review of, amongst other things, a decision to relax certain conditions of title. The applicants submitted that the application for an urgent interdict was prompted by the 'fear that a completed building might render an eventual successful review *brutum fulmen*, in other words, no order for demolition would be granted, a successful review notwithstanding, due to a reluctance on the part of the court to order demolition of the completed building'.

[54] 2008 (3) SA 633 (C) 653G.

[55] *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE); *Van Rensburg NO and another v Equus Training and Consulting CC and another* [2009] ZAECPEHC 50 (25 September 2009) and *Van Rensburg NO v Naidoo NO* [2010] ZASCA 68 (26 May 2010).

[56] 2008 (2) SA 8 (SE). Refer to Van der Walt AJ 'Constitutional property law' 2009 *ASSAL* 218-258 at 222, Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 35 and Van der Walt AJ *The law of neighbours* (2010) 342 footnote 15 for a discussion of this case.

respondents (the Shan Trust) in contravention of certain conditions of title.[57] It was evident that the Shan Trust had a history of ignoring not only the rights of its neighbours, but also the land-use and building requirements laid down by the municipality for properties situated within its jurisdiction.[58] The court confirmed, with reference to *De Villiers v Kalson*,[59] that it has the discretion to either grant the demolition of offending buildings or order the payment of damages where a neighbour encroaches on the rights of other property owners in a township.[60] Froneman J concluded that a demolition order was a more suitable remedy in this case because the payment of damages would not adequately compensate the applicants for the loss of their privacy. Moreover, the payment of damages would not restore the character of the neighbourhood.[61]

Similarly, in *Van Rensburg NO and another v Equus Training and Consulting CC and another* (*Van Rensburg v Equus Training and Consulting*),[62] Froneman J ordered the demolition of another building that was built in breach of a condition of title that was registered against the first respondent's property and 71 other properties in the area. The first respondent had unsuccessfully applied for the removal of the condition of title from the title deed of his property and as result the applicants approached the court for a demolition order.[63] It is apparent that it was the first respondent's intention to convert the improved buildings into a guesthouse. The first respondent had obtained special consent to run a guesthouse on its property and it requested the court to exercise its discretion to refuse the interdicts. The following reasons were advanced in support of

[57] 2008 (2) SA 8 (SE) 11I-J and 12A-B.

[58] 2008 (2) SA 8 (SE) 10F-H and 11E-H.

[59] 1928 EDL 217 at 231.

[60] 2008 (2) SA 8 (SE) 11C-D.

[61] 2008 (2) SA 8 (SE) 11I-12A.

[62] [2009] ZAECPEHC 50 (25 September 2009). Refer to Van der Walt AJ 'Constitutional property law' 2009 *ASSAL* 218-258 at 222-223 for a discussion of the case.

[63] [2009] ZAECPEHC 50 (25 September 2009) para 3. The applicants also applied for an interdict prohibiting the first respondent from building over the building line adjoining the street frontage of the bordering property. They further applied for a mandatory interdict compelling the first respondent to demolish the parts of the building that encroached over the building line.

the first respondent's request: it had obtained special consent; other guesthouses were operated in the vicinity and the removal of the restrictive conditions might still occur.[64]

Froneman J held that there were no exceptional circumstances in this case that would influence the court to not grant an interdict. Furthermore, the first respondent had continued with its unlawful activities for a prolonged period of time without considering the fact that its actions were unlawful pending the successful removal of the conditions of title.[65] The court's role as 'enforcer of the law' would be undermined if it allowed the respondent's unlawful conduct (and concomitant consequences of the unlawful conduct, such as cost of the construction and of completed work) to stand in the way of the law taking its ordinary course.[66] Froneman J explained that similar considerations as those in *Van Rensburg v NMMM* applied to this case and that there was no reason why it should not order the demolition of first respondent's buildings.[67]

In the most recent decision, *Van Rensburg NO v Naidoo NO* (*Van Rensburg v Naidoo*),[68] the Supreme Court of Appeal (the court) ended the five year long battle between the Shan Trust and the Hobie Trust.[69] The court had to hear two appeals. Firstly, it had to decide whether Van der Byl J was correct to set aside the demolition order granted by Froneman J in *Van Rensburg v NMMM*.[70] Secondly, the court had to

[64] [2009] ZAECPEHC 50 (25 September 2009) para 6. In response, the court referred to *United Technical Equipment Co v Johannesburg City Council* 1987 (4) SA 347 (T) 347G, where it was held that a court does not have the general discretion to postpone the operation of an interdict. The court further held that such a discretion only arises 'in exceptional circumstances'.

[65] [2009] ZAECPEHC 50 (25 September 2009) para 6.

[66] [2009] ZAECPEHC 50 (25 September 2009) para 6.

[67] [2009] ZAECPEHC 50 (25 September 2009) para 7.

[68] [2010] ZASCA 68 (26 May 2010). For a discussion of this case, refer to Van der Walt AJ 'Property' (2010) 2 *JQR* 2.4.1

[69] These were the parties in *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE).

[70] [2010] ZASCA 68 (26 May 2010) para 1, with reference to *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE).

decide whether the MEC had the power to remove conditions of title from the title deeds of properties.[71]

With regard to the first appeal, the court held that there was no authority for the notion that property owners should not be afforded a hearing prior to the removal of conditions of title. In fact, such a proposition would be in conflict with the current constitutional structure.[72] With reference to *Malan v Ardconnel Investments*[73] the court confirmed that conditions of title enure to the benefit of all the erven in a township, unless there are indications to the contrary. These conditions are inserted in the title deed with the purpose of preserving the character of an area.[74] The court stated that:

> '[i]f landowners across the length and breadth of South Africa, who presently enjoy the benefits of restrictive conditions, were to be told that there rights, flowing from these conditions, could be removed at the whim of a repository power, without hearing them or providing an opportunity for them to object, they would rightly be in a state of shock'.[75]

The nature of the condition of title indicated that the MEC could not remove it without consulting all the property owners in the area. Even if some changes have been allowed in the past, this does not mean that 'further change is warranted or

[71] [2010] ZASCA 68 (26 May 2010) para 1. This is an appeal against Dambuza J's finding in *Van Rensburg NO and another v MEC for Housing, Local Government and Traditional Affairs, Eastern Cape Province and others* [2009] ZAECPEHC 27 (2 June 2009), to the effect that the MEC's decision to remove conditions of title from the title deed of the property was invalid and had to be set aside.

[72] [2010] ZASCA 68 (26 May 2010) paras 32-33 The court further explained that in *Garden Cities v Registrar of Deeds* 1950 (3) SA 239 (C), it was decided that the administrator could amend or alter conditions of title without first consulting the affected property owners. However, this decision was decided 60 years ago and it would be unsustainable under the current constitutional dispensation.

[73] 1988 (2) SA 12 (A) 38B-C and 39F-G.

[74] [2010] ZASCA 68 (26 May 2010) para 37.

[75] [2010] ZASCA 68 (26 May 2010) para 37.

unchallengeable'.[76] Therefore, the MEC does not possess the power to remove the condition.[77]

As to the second appeal the court decided that Froneman J had correctly concluded that a demolition order was the only way to protect the applicant's and the neighbours' rights.[78] Froneman J reached this decision once he had considered the respondent's flagrant disregard for the law over the years. He also considered the possibility of ordering the respondent to pay damages, but he correctly decided that this would not restore the neighbouring property owners' rights.[79] Moreover, the principle of legality is the 'cornerstone' of the Constitution and it applies to 'government and governed alike'.[80] Transgressors like the Shan Trust, that continuously flout the law, are undeserving of the protection afforded by Van der Byl AJ.[81] As a result, the court upheld the demolition order.[82]

Together, these cases show that the courts will order the demolition of structures built in conflict with restrictive conditions. In so doing the courts protect the character of the neighbourhood and the limited real rights held by other land owners in the township. These decisions make it clear that offending land owners will no longer be able to rely on the completion of building works as a *fait accompli* (completed building works) to avoid a demolition order. The value of the building works and the extent to which the illegal structure has been completed are generally irrelevant and will not have a bearing on a court's decision to grant a demolition order.

[76] [2010] ZASCA 68 (26 May 2010) para 40.

[77] [2010] ZASCA 68 (26 May 2010) paras 34 and 41. The court also stated that it was unacceptable for the municipality and the MECs to adopt the attitude that the zoning scheme trumped conditions of title.

[78] [2010] ZASCA 68 (26 May 2010) para 41.

[79] [2010] ZASCA 68 (26 May 2010) para 53.

[80] [2010] ZASCA 68 (26 May 2010) para 54.

[81] [2010] ZASCA 68 (26 May 2010) para 54.

[82] [2010] ZASCA 68 (26 May 2010) para 54.

3 2 3 *Locus standi* to enforce restrictive conditions

It is generally accepted that it is the local authorities' responsibility to enforce compliance with conditions of title. Pienaar explains that the unique method of registering restrictive conditions has led to some confusion pertaining to neighbouring land owners' standing to enforce these conditions.[83] Initially, the courts attempted to determine the question of *locus standi* by considering the four guidelines provided in *Elliston v Reacher*.[84] In the authoritative case of *Malan v Ardconnel Investments (Pty) Ltd (Malan v Ardconnel Investments)*,[85] the court held that the plaintiff did not have to comply with the *Elliston v Reacher* requirements to establish *locus standi*. Furthermore,

[83] Pienaar JM *Die regsaard van beperkende en dorpstigtingsvoorwaardes* unpublished LLM thesis PU for CHE (1990) 38.

[84] [1908] 2 Ch 374; see further *Malan v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A); Pienaar JM *Die regsaard van beperkende en dorpstigtingsvoorwaardes* unpublished LLM thesis PU for CHE (1990) 43. For a more comprehensive explanation of the arguments surrounding *locus standi* to enforce restrictive conditions refer to Van der Westhuizen JM '*Locus standi in judicio* van persone wat nakoming van beperkende voorwaardes eis; regsaard van beperkende voorwaardes: *Malan v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A)' (1990) 53 *THRHR* 130-136 at 133. Refer to footnote 24 for an overview of the *Elliston v Reacher* requirements.

[85] 1988 (2) SA 12 (A) 30I-33C. In this case the township owner applied to have a township established under the Townships and Town-Planning Ordinance 11 of 1931 (T). The application was successful and 263 erven were created. Various restrictive conditions were registered against the title deeds of the properties. The respondent purchased erf 184, which fell into the category of a special business erf – a property that could only be used for trade and business purposes. Registered against the title deed of erf 184 were restrictive conditions B1, B2, B3, B8 and B9. The appellant purchased erf 42, an industrial erf, with restrictive conditions B1, B2, B8 and B9 and B7. Restrictive condition B7 indicated that the property was an industrial erf, subject to certain limitations including the fact that the property could not be used for 'retail trading'. The appellant leased his property to the second appellant, who proceeded to conduct a retail food store on the premises, in contravention of the restrictive condition B7. The respondent approached the Witwatersrand Local Division for an urgent interdict prohibiting the use of the appellant's property in contravention of the restrictive condition. The interdict was granted and subsequently the appellant appealed against the decision of the court *a quo*. Specifically, the appellants challenged the *locus standi* of the respondent to enforce compliance with the condition. In support of their challenge, the appellants relied on the fact that the restrictive condition was imposed for the benefit of the township owner. Furthermore, the appellants argued that the respondents did not comply with the requirements of *Elliston v Reacher* [1908] 2 Ch 374 as restrictive condition B7 was not common to both properties.

the court held that South African law has the advantage that restrictive conditions[86] 'run with the land in townships as registered servitudes'.[87] It held that the restrictive conditions (described as registered servitudes) were of a praedial nature as they created reciprocal obligations that operated for the benefit of all the properties in a township.[88] Different restrictive conditions were registered against the various properties in the case, but in the court's view this did not detract from the fact that a praedial servitude was created with the concomitant consequence that it could be enforced by

[86] The court does not use the term 'restrictive conditions' but rather restrictive title conditions. See *Malan v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) 36J.

[87] 1988 (2) SA 12 (A) 36J and 37A-J. The court explained that in South African law a distinction is drawn between personal and praedial servitudes. It explained that normally the details of the servitude holder (in the case of a personal servitude) or the dominant tenement (in the case of a praedial servitude) are registered against the title deed of the servient tenement. For the sake of convenience the details of the praedial servitude are also inserted in the title deed of the dominant tenement. In the instance of restrictive conditions, the condition is registered against the deed of the servient tenement, but the details of the beneficiaries of the condition are not indicated on the title deed of the servient tenement. Compare fn 39 above.

[88] 1988 (2) SA 12 (A) 39F.

any property owner in the township.[89] Stated differently, *Malan v Ardconnel Investments* is authority for the principle that a property owner can enforce restrictive conditions that are of a praedial nature, registered against the property of a neighbour, even if that specific restriction does not appear on the title deed of his own property.[90]

This position has since been confirmed by a series of cases where the respective courts found that land owners in a township, and voluntary associations acting on behalf

[89] 1988 (2) SA 12 (A) 38A-C, 39H. The court held that it is a 'matter of interpretation to establish whether the restrictive conditions were made pursuant to a general scheme for the reciprocal benefit of the erven'. The court further explained that one had to consider all the surrounding circumstances as well as the nature of the restrictive conditions to ascertain whether a restrictive condition is of a praedial or a personal nature. Similarly, in *Kotze v Haldon Estates (Edms) Bpk en andere* [2010] ZAFSHC 102 (23 September 2010) the court had to determine whether a neighbouring property owner (the applicant) had the *locus standi* to enforce compliance with restrictive conditions registered against the title deed of the first respondent. The municipality was indicated as the beneficiary of the condition. The court explained with reference to *Ex Parte Rovian Trust (Pty) Ltd* 1983 (3) SA 209 (D) 213B-C that all the owners in a town-planning scheme (*dorpaanlegskema*) have the right to enforce compliance with restrictive conditions. A court cannot allow deviation from the restrictive condition even if only one owner objects to such a change. This is so regardless of the fact that the owner's objection against the deviation is trivial. The court referred to the circumstances under which the condition was created as well as to related factors. It concluded that the condition dealt with the first respondent's use rights pertaining to his property and that all the property owners in the area had a right to enforce compliance with that condition. This meant that the applicant, as beneficiary of the condition, possessed the *locus standi* to enforce compliance with the restrictive condition.

[90] Van Wyk in Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 189-199 explains that the courts have not drawn a distinction between the *locus standi* to enforce conditions created by contract (restrictive covenants) and conditions created by legislation (conditions of title). Rather, the courts have relied on the following principles to determine the question of *locus standi:* firstly, a plaintiff must show that he has a personal interest in the enforcement of the restriction. Secondly, if legislation is enacted for the benefit of a specific group of persons, those persons will have the right to enforce that restriction. Thirdly, if legislation is enacted in the public interest any member of the public will have *locus standi*, provided that he can prove that he has suffered damage. If a restriction is imposed to the benefit all property owners in an area, those property owners will have *locus standi*. Finally, property owners within the area of a town-planning scheme have the right to enforce compliance with that scheme. Van Wyk concludes that it is no longer necessary to distinguish between conditions of title and restrictive covenants for purposes of *locus standi*.

of land owners, have standing to enforce compliance with legislation, zoning schemes or restrictive conditions.[91] In *PS Booksellers (Pty) Ltd and another v Harrison and others* (*PS Booksellers v Harrison*)[92] for example, the court confirmed the *locus standi* of a voluntary association to restrictive conditions and the provisions of a zoning scheme. The respondents questioned the second applicant's (the Camps Bay Residents and Ratepayers Association) standing on the grounds that the voluntary association was not a party to the pending appeal.[93] In response, the court held that the respondents' argument 'flies in the face of the recognized standing of residents and property owners, in a community or township to enforce the provisions of zoning schemes'.[94] The court confirmed the significance of voluntary associations, stating that the respondents' argument ignored the 'developing and modern approach' of standing of an association such as the second applicant, which represented the interests of residents and ratepayers in a specific community.[95] It held that the second applicant's standing derived from the fact that it had an interest (as an association acting on behalf of homeowners and residents) in the enforcement of the restrictive condition and the

[91] Van der Walt AJ *The law of neighbours* (2010) 348 with reference to *Erf 167 Orchards CC v Greater Johannesburg Metropolitan Council Johannesburg Administration and another* 1999 CLR 91 (W); *PS Booksellers (Pty) Ltd and another v Harrison and others* 2008 (3) SA 633 (C) para 19; *Chairperson, Walmer Estates Residents Community Forum and another v City of Cape Town and others* 2009 (2) SA 175 (C) and *Tergniet and Toekoms Action Group and 34 others v Outeniqua Kreosootpale (Pty) Ltd and others* [2009] ZAWCHC 6 (23 January 2009) para 22.

[92] 2008 (3) SA 633 (C) 638G-639E.

[93] 2008 (3) SA 633 (C) 639G.

[94] 2008 (3) SA 633 (C) 638H.

[95] 2008 (3) SA 633 (C) 638I-J. In support of this statement the court referred to *Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and others* 2004 (2) SA 81 (SE) 103C-F, where Plasket J explained that the standing of associations was recognised even during the era of 'restrictive pre-1994 common-law rules of standing'. He further explained that under the Constitution courts are required to promote the spirit, purport and object of the Bill of Rights and section 34 of the Constitution makes provision for 'the entrenchment of the fundamental right of access to court'. The rules of standing, in a constitutional setting, must be applied broadly and the common law must be developed to recognise standing of associations that act in the public interest.

zoning regulation. Its interest did not stem from its status in terms of the appeal.[96] Therefore, one can conclude in light of *PS Booksellers v Harrison* that a voluntary association (such as a neighbours' or ratepayers' association) does have *locus standi* to act on behalf of a property owner, or all the owners in a township who seek enforcement of restrictive conditions.[97]

Finally, section 38 of the Constitution provides that 'anyone' listed in the section can approach the court alleging that a right in the Bill of Rights had been infringed, including 'anyone acting as a member of, or in the interest of, a group or class of persons'[98] and anyone who acts in the public interest.[99] As explained above, the limited

[96] 2008 (3) SA 633 (C) 639E.

[97] The standing of a voluntary association acting on behalf of property owners in an area was also confirmed in *Tergniet and Toekoms Action Group and 34 others v Outeniqua Kreosootpale (Pty) Ltd and others* [2009] ZAWCHC 6 (23 January 2009) para 22.

[98] Section 38(c) of the Constitution. For a detailed discussion of section 38(c) of the Constitution refer to Loots C 'Standing, ripeness and mootness' in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* Volume 1 2 ed (2003 original service Dec 2003) chapter 7 at 7-10. Loots explain that this provision recognises a class action in South African law. See in this regard *Bafokeng Tribe v Impala Platinum Ltd and others* 1999 (3) SA 517 (B), where the court decided that the Bafokeng tribe did have the *locus standi* to assert the rights of its members in court. The words 'acting as a member of or in the interest of' illustrates that a plaintiff does not necessarily have to pursue an 'own interest'. In this regard Loots refers to *Minister of Health and Welfare v Woodcarb (Pty) Ltd and another* 1996 (3) SA 155 (N), where the court decided that the minister did have the *locus standi* to prevent atmospheric pollution on the grounds of section 29 of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution).

real rights created by conditions of title and restrictive covenants are recognised as constitutional property for purposes of section 25 of the Constitution.[100] This provision confirms that land owners, and voluntary associations acting on behalf of land owners, will have the standing to assert their constitutional rights in court.[101] In conclusion, neighbouring land owners and voluntary associations acting on behalf of neighbouring land owners has the *locus standi* to enforce compliance with restrictive conditions by requesting of the court to order the demolition of unlawful structures in their neighbourhood.

3 2 4 Removal of restrictive conditions

As explained above, property owners must first remove restrictive conditions from their title deeds before they can proceed to build in manner that would otherwise be prohibited by those conditions. Van Wyk explains that property owners can remove conditions of title by way of a court order or by way of an application to the Administrator

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[99] Section 38(d) of the Constitution. For a more comprehensive discussion of section 38(d) refer to Loots C 'Standing, ripeness and mootness' in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* Volume 1 2 ed (2003 original service: Dec 2003) chapter 7 at 7-11-7-12. Loots refers to O' Regan J's dissenting judgement in *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 (1) SA 984 (CC), where she held that a litigant had the right to claim relief in the public interest on the grounds of section 7(4)(v) of the Interim Constitution. Loots explains that section 7(4)(v) of the Interim Constitution is 'virtually identical' to section 38(d) of the Constitution. Reference is also made to *Port Elizabeth Municipality v Prut NO and another* 1996 (4) SA 318 (E) 325-326, where the municipality applied for an order declaring that it did not unfairly discriminate against certain ratepayers by writing off debts owed by areas governed by the Black Local Authorities Act 102 of 1982. The court held, on the basis of section 7(4)(v) of the Interim Constitution, that the municipality was acting in the public interest. Finally, Loots refers to *Van Rooyen and others v the State and others* 2001 (4) SA 396 (T) 423G-H, where the court determined that a magistrate and the Association of Regional Magistrates of South Africa were acting in the public interest by challenging the constitutional validity of the Magistrates Commission established in terms of the Magistrates Act 90 of 1993. The court held that the litigants could rely on section 38(d) for standing.

[100] *Ex Parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) para 19.

[101] Chapter 5 elaborates on the constitutional implications of the non-enforcement of conditions of title and restrictive covenants.

in terms of the Removal of Restrictions Act 84 of 1967 (the Removal Act).[102] The application for a court order can either be an *ex parte* application or an application on notice. In the case of the former, a *rule nisi* would typically be granted calling on any person to show cause as to why the condition of title should not be expunged from the title deed.[103] In the case of the latter a notice must be served on all erf holders who benefit from the condition.[104] Van Wyk further explains that the purpose of the Removal Act is to provide procedures in terms of which restrictive conditions can be removed, altered or suspended by the administrator of the province on his own accord; or upon application by any person, or at the request of the minister. Other ways in which restrictive conditions can be removed include the wording of the condition; in terms of the provincial ordinances; by renunciation and by way of prescription.[105]

The Western Cape decision, *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape, and others* (*Camps Bay*),[106] dealt with the negligence of the local authority in removing conditions of title. In this case the applicants, a voluntary association of homeowners,

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[102] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments unpublished* LLD thesis Unisa (1990) 257-282.

[103] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments unpublished* LLD thesis Unisa (1990) 258-259 explains that in this instance a condition will be removed on the basis of implied consent. If there are no objections, the court can infer that all the land owners had consented to the removal of the condition. Importantly, any objection from a neighbouring land owner will be sufficient to veto the decision to remove the condition.

[104] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 262-264 explains that application by notice is the less popular procedure because of the costs involved in notifying each neighbour would be affected by the removal.

[105] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments unpublished* LLD thesis Unisa (1990) 257-282. At 255-256 Van Wyk explains that restrictive covenants can also be removed by way of an *inter partes* mutual agreement. The land owner is required to obtain the consent of all land owners that are party to the agreement (in other words the restrictive covenant is registered against their title deeds) before he can have the covenant removed. This method of removal is only applicable to restrictive covenants (and not to conditions of title) because they are created in terms of an agreement. A land owner can also remove a restrictive covenant in terms of the Deeds Registries Act 47 of 1937.

[106] 2001 (4) SA 294 (C).

applied to have the first respondent's (the minister's) decision to remove certain restrictive conditions set aside on review.[107] This was the second round of review proceedings launched against a decision to remove title deed conditions.[108] In support of the application for review, the applicants relied on the fact that the minister, in reaching his decision to remove the restrictive conditions, did not comply with the

[107] 2001 (4) SA 294 (C) 302B-J, 303E-J, 304A-H, 305A-C. The other respondents were the City of Cape Town (second respondent), the property owner (the third respondent) and a banking institution that financed the development (the fourth respondent). This matter was brought to court on the ground that the property owner stood to incur financial losses and because of the possibility that the development was unlawful, which could result in application for a demolition order.

[108] 2001 (4) SA 294 (C) 302B-J, 303E-J, 304A-H, 305A-I. The first round of review proceedings was launched against the decision of the erstwhile Director of Local Government, to remove the condition of title that prohibited the erection of flats on the property. This condition was removed without complying with statutory formalities. As a result, the condition of title did not appear on the title deed at the time when the third respondent purchased the land with the intention of constructing ultra-luxurious flats on the property. The respondent obtained three mortgage bonds to the value of R12 million to finance the development and building plans were submitted for approval to the municipality. The municipality did not refer the building plans to the applicants for comments (as was usual practice) since the conditions of title did not on the face of it prohibit the erection of flats. As a result, no objections were raised against the proposed development and the plans were approved. Shortly after approval, the property owner commenced to develop the property. In March 1997 interested parties launched proceedings (known as the first review application) to have the decision to remove the condition of title reviewed and set aside. During May 1997 the third respondent yet again applied, in terms of the procedures of the Act, to have the condition of title removed. This application was approved in 1998 and subsequently the developer applied for the discharge of the interdict given during the first review proceedings. Consequently, the applicants re-launched the application for the review of the decision to remove the conditions of title.

procedure for removal set out in the Removal Act.[109] The court's attention was drawn to specific irregularities, namely the premature objection process,[110] unlawful delegation of authority,[111] absence of notice to all affected parties[112] and failure to consider

[109] 2001 (4) SA 294 (C) 317A-B, with reference to the Removal of Restrictions Act 84 of 1967. The province of Gauteng has its own legislation in terms of which restrictions registered against land can be removed, namely the Gauteng Removal of Restrictions Act 3 of 1996. Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 274-278 explains that the Removal of Restrictions Act 84 of 1967 enables the administrator, either on his own accord or on application by a property owner, to remove, alter or suspend restrictions that are registered against land. The administrator may only act to remove restrictions, if it is desirable and in the interest of the township or in the public interest. Prior to removing a condition on his own accord, the administrator must inform the local authority and request that comments and recommendations be made within a stipulated time period. A notice must be published in the official *Gazette* and individual notices may be given to all property owners directly affected by the decision. A property owner must lodge an application for the removal of the condition with the local authority and the provincial secretary or, alternatively, with the provincial secretary. The provincial secretary must cause a notice to be published in the official *Gazette*, which invites the public to inspect the application. Notice may also be served on every owner directly affected by the application for removal, and a copy of each objection received must be served on the applicant. Upon the expiry of the time period, the objections, as well the applications will be lodged with the Townships Board for inspection, which will then make a recommendation to the administrator. The administrator will then decide whether the condition should be removed. It is also possible for the administrator to make the removal subject to certain conditions. For more information in this regard, refer to Van Wyk 'Removing restrictive conditions and preserving the residential character of a neighbourhood' (1992) 55 *THRHR* 369-385 as well as to Van Wyk J *Planning law: principles and procedures of land-use management* (1999) 190-236.

[110] 2001 (4) SA 294 (C) 317C-F. Section 3(2) of Act 84 of 1967 stipulates that the local authority must consider the application for removal, whereafter it must forward the original application, together with its comments and recommendations, to the director-general. The director-general must initiate the process of notification and call for objections once he has received the application, comments and recommendations from the local authority. In this case the municipality did not comply with the directions of section 3(2) as it called for objections prior to forwarding the applications and its recommendations to the director-general. The court held that it could 'not safely say that the departure from the prescribed procedure did not affect the final result'.

[111] 2001 (4) SA 294 (C) 317G-318A-D.

objections.[113] The court held that the minister's decision was flawed due to his failure to consider objections and the abovementioned irregularities in the decision-making process.[114] In considering the justifiability of the minister's decision, the court referred to section 2(1) of the Removal Act, which stipulates that the minister can only grant the removal of the conditions if one or more circumstances in sections 2(1)(a) and (b) were present. The court reasoned that it only had to consider section 2(1)(a), which stipulates that the minister 'must be satisfied' that it is 'desirable' to remove the conditions as it is '1) in the interest of the establishment or development of any township; or 2) in the interest of any area; or 3) in the public interest'.[115] Some of the reasons advanced by the minister to justify his decision were the fact that the development would conform to existing developments;[116] that the development would not detract from the character of the neighbourhood[117] and the fact that the development corresponded with the zoning scheme.[118] The court determined that the 'fact that a new development conforms to existing developments does not show that the new development is in the interests of the township, the area or the public'.[119] Similarly, a development is not in the interest of the township, area or public simply because it will not detract from the character of the neighbourhood.[120]

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[112] 2001 (4) SA 294 (C) 318E-I. Notice was only given to nine owners in the vicinity. The court explained that the decision was 'so obviously wrong that no person properly applying his or her mind to the matter could have reached the conclusion that only these nine persons were 'directly affected' by the removal application'. Every person in the township was entitled to be informed of the removal application.

[113] 2001 (4) SA 294 (C) 318J-320F.

[114] 2001 (4) SA 294 (C) 320F.

[115] 2001 (4) SA 294 (C) 320J-321A-B.

[116] 2001 (4) SA 294 (C) 322A-B.

[117] 2001 (4) SA 294 (C) 323G-H.

[118] 2001 (4) SA 294 (C) 324E-F.

[119] 2001 (4) SA 294 (C) 323C.

[120] 2001 (4) SA 294 (C) 323H.

With reference to *Malan v Ardconnel Investments*[121] the court confirmed that restrictive conditions take precedence over the zoning scheme of a township.[122] The court held that:

> '[i]f it were in the public interest for all properties to be subject only to zoning restrictions, the Legislature would simply have abolished all restrictive title deed conditions by statute. Instead, it has laid down a procedure whereby such title deed restrictions can be removed only if to do so would specifically be in the interest of the township, area or public. Indeed, a theme running through the arguments put up by the developer in support of the removal application is that restrictive conditions are a relic of the past and should be abolished in favour of the zoning scheme.'[123]

The court continued that 'this is not the philosophy of the Act and it was inappropriate and irregular for the Minister to have allowed himself to be swayed by this consideration'.[124] Consequently, the court set aside the minister's decision to remove the conditions of title, with the implication that the third respondent's activities became unlawful.[125] The third respondent was interdicted from continuing with the building works in contravention of the conditions of title.[126] Moreover, the applicants became entitled to apply for demolition of the existing structures built on the third respondent's property.[127]

[121] 1988 (2) SA 12 (A) 40E-F.

[122] 2001 (4) SA 294 (C) 324F.

[123] 2001 (4) SA 294 (C) 324H.

[124] 2001 (4) SA 294 (C) 324G-I.

[125] 2001 (4) SA 294 (C) 328A-B.

[126] 2001 (4) SA 294 (C) 329G.

[127] 2001 (4) SA 294 (C) 329J.

Camps Bay firstly shows that the removal of restrictive conditions is a complicated and cumbersome process. Secondly, it confirms that the courts will enforce compliance with a restrictive condition even if the land owner constructed a building in *bona fide* belief that his actions would not conflict with such as condition. Restrictive conditions constitute limited real rights and they fulfil an important function as a town-planning tool. It is therefore desirable for the court to enforce compliance with restrictive conditions if necessary by way of a demolition order, even if it causes some hardship for the offending land owner. Generally, it is also clear that there are instances where it would be impossible for the land owner to have the conditions expunged from his title deed. Typically, this would be where neighbouring land owners, as the holders of limited real rights created by conditions of title, object to such a removal. *Camps Bay* also emphasise that it is extremely important to follow the correct procedures set out in the Removal Act. The land owner in *Camps Bay* faced the potential demolition of its apartment blocks because they were constructed in conflict with a condition of title that was incorrectly removed from the title deed.

3 2 5 Conclusion

The fundamental difference between the three *Van Rensburg* cases[128] and the *Camps Bay*[129] judgment is that in the former the respondents had blatantly contravened the conditions of title, whereas in the latter, the respondent's contravention of the condition of title could be ascribed to the city's negligence to effectively remove the condition from the title deed. The outcome of these decisions is, however, more or less the same. In the *Van Rensburg* cases, the respective courts ordered the demolition of the buildings to the extent that they contravened the condition of title. In *Camps Bay*, the court ordered that any one of the applicants 'may apply to Court at any time for an order

[128] *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE); *Van Rensburg NO and another v Equus Training and Consulting CC and another* [2009] ZAECPEHC 50 (25 September 2009) and Van Rensburg NO v Naidoo NO [2010] ZASCA 68 (26 May 2010).

[129] 2001 (4) SA 294 (C).

directing the third respondent forthwith to demolish all building work' built in contravention of conditions of title.[130] Collectively, these cases make it clear that it is unlawful for a person to proceed with building operations prior to having conflicting restrictive conditions removed in accordance with the Removal Act. Furthermore, if a person should proceed with building works in conflict with a restrictive condition that had not been removed lawfully the courts will more often than not order demolition of the unlawful building works. A relevant factor is whether a person has proceeded with building operations, pending the outcome of removal proceedings. Additionally, it is evident that the court will not allow a factor such as the financial loss suffered by the guilty property owner to stand in the way of granting a demolition order in instances where it is justified to do so. With reference to all three the *Van Rensburg* decisions, that property owners who have built in contravention of restrictive conditions will no longer be able to successfully rely on a *fait accompli* (completed building works) in the hope of avoiding a demolition order, if such an opportunity ever existed before these decisions.

An important aspect of the *Camps Bay* decision is that it confirmed that conditions of title (and other restrictive conditions) fulfil an important function as a town-planning tool. The court explained that the restrictive conditions are not a 'relic of the past' and that it still performs an important function as a town-planning tool.[131] It also emphasised that to have a restrictive condition removed the minister has to be satisfied that it would be in the interest of the area, township and in the public interest. A potential development will only comply with these requirements if it constitutes an actual improvement to the area where it is built. A building that conforms to existing developments in the area or that does not detract from the character of an area does not amount to an improvement. In light of this consideration, one can argue that a contravening owner would have to prove that his development would be in the interest of the public and of the area where it is situated to avoid a demolition order. Similarly, a court must apply the same criteria when having to decide whether a building, built in

[130] 2001 (4) SA 294 (C) 329J.

[131] *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape, and others* 2001 (4) SA 294 (C) 324H-I.

contravention of a restrictive condition would have to be demolished or partially demolished so as to bring such a structure in line with the condition. It can only refuse to order the demolition of an unlawful development if the development itself will be in the interest of an area, township and the public. Furthermore, even if there have been some changes in the area, this does not necessarily mean that further change is warranted.[132]

One can argue that a demolition order or a partial demolition order[133] is a more suitable remedy to protect the rights of property owners in a specific township. The reason for this is that it is unclear which neighbouring land owners' should be compensated for the breach of a restrictive condition. A damages award, will arguably, only be paid to adjacent neighbouring land owners. This remedy is unsuitable to vindicate the limited real rights held by all the land owners in the township. Finally, demolition or partial demolition of a building is preferable to a damages order because the latter remedy will not restore the character of the neighbourhood once it is tarnished by a contravening building.[134] It may seem excessive to order the demolition of a building especially where, as in *Camps Bay*, the property owner had acted in *bona fide* belief that he was acting in accordance with the law. Nevertheless, as Van Wyk argues, the property owner is not left without a remedy as he can hold the local authority delictually liable for negligence.[135]

In conclusion, illegal and unlawful land uses are on the increase despite the existence of town-planning tools such as restrictive conditions that regulate land use. Possibly, this can be ascribed to the failure of local authorities, for whatever reason, to efficiently regulate building and development in their area. Restrictive conditions such

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[132] *Van Rensburg NO v Naidoo NO* [2010] ZASCA 68 (26 May 2010) para 40.

[133] A partial demolition order will compel the local authority to demolish those parts of a building that are prohibited by the restrictive condition. For example, the local authority can be compelled by a court to demolish an additional storey that the owner built in contravention of restrictive conditions.

[134] Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 661 with reference to *Van Rensburg and another v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE).

[135] Van Wyk J 'Revaluation of conditions of title: *Camps Bay Ratepayers Association v Minister of Planning Western Cape* 2001 (4) SA 294 (C)' (2002) 65 *THRHR* 642-649 at 648.

as conditions of title remain an indispensable planning tool and can assist local authorities to regulate developments in the area of their jurisdiction, provided that these restrictions are effectively enforced. The *Van Rensburg* cases and the *Camps Bay* case illustrate the value of a demolition order as a means of enforcement. A demolition order protects the rights of other property owners and restores the character of a neighbourhood. A demolition order can also serve as a deterrent to property owners that intend to develop properties in contravention of restrictive conditions.

3 3 The demolition of illegal buildings

3 3 1 Introduction

As explained above,[136] there is a general belief that the courts are unwilling to demolish especially valuable buildings. There are, however, some older cases where the courts have ordered the demolition of illegal buildings.[137] For purposes of this discussion illegal buildings are buildings that were built in disregard or contravention of legislation such as the town-planning ordinances, the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act) or other applicable legislation. The defining characteristic of illegal buildings is that building plans for these buildings have never been approved by the local authority as required by law or that they have not been built according to the approved plans. Often, in addition to the lack of approved building plans, these buildings will contravene other statutory enactments such as legislation designed to protect the health and safety interests of the public or to preserve the environment. Where the unlawful buildings referred to in the previous section conflicted with established private-law rights, illegal buildings contravene the objective law. In principle, the case in favour of a demolition order should therefore be even stronger.

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[136] See section 3 1.

[137] *Ostrowiak v Pinetown Town Board* 1948 (3) SA 548 (D); *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T); *Transvaalse Raad vir die Ontwikkeling van Buitestedelike Gebiede v Venter* 1985 (3) SA 979 (T).

There are older cases where the courts have ordered the demolition of buildings that were not erected in accordance with approved building plans. An example of such a case is *Ostrowiak v Pinetown Town Board*,[138] where the court confirmed the power of the respondent to demolish two rondavels built by the applicant without submitting building plans as required by certain by-laws. The court concluded its judgment by stating:

> 'I cannot leave the case without calling attention to one feature: An attempt has been made in this case to invoke the Court's indulgence on the ground of apparent hardship, notwithstanding the very clear terms of the legislation. The sympathies of the Court and its view of the general public interest can have no bearing upon a matter of this sort … The public interest requires that the control and regulation of buildings in local authority areas should be placed in the hands of the local authority itself. This may, in individual cases, cause some hardship, but if private persons are permitted to erect buildings in the teeth of the law, then there is an end to any sound local government.'[139]

Similarly, in the case of *Transvaalse Raad vir die Ontwikkeling van Buitestedelike Gebiede v Venter*,[140] the court confirmed the applicant's power to demolish four houses and the accompanying car ports on the grounds that the respondent had built them in contravention of the provisions of the town-planning scheme created in terms of the Town-planning and Townships Ordinance 25 of 1965 (T). The respondent had also failed to submit building plans for the houses that were built on the property. The court held, with reference to *Ostrowiak v Pinetown Town Board*,[141] that the applicant had a statutory duty to ensure compliance with the town-planning scheme by exercising control over the nature and extent of building operations.[142] It was clear that the respondent would suffer hardship once the applicant had performed its statutory duties,

[138] 1948 (3) SA 548 (D).

[139] 1948 (3) SA 548 (D) 591.

[140] 1985 (3) SA 979 (T).

[141] 1948 (3) SA 548 (D).

[142] 1985 (3) SA 979 (T) 987H-I.

but the respondent had brought the hardship upon himself. The court will not allow an individual to jeopardise the effectiveness of the entire town-planning scheme.[143]

In more recent case law[144] the courts adopted a similar attitude as in *Ostrowiak v Pinetown Town Board* and *Transvaalse Raad vir die Ontwikkeling van Buitestedelike Gebiede v Venter*. Together, these decisions show that the courts are prepared to order the demolition of buildings to compel the local authority to observe its statutory duties, or alternatively, to assist the local authority to enforce compliance with building and development laws in its area of jurisdiction. These cases further illustrate the various interests that will be protected by the granting of a demolition order in the instance of illegal building works.

3 3 2 Recent case law concerning illegal buildings

3 3 2 1 The locus standi to enforce compliance with the law

Within the context of illegal buildings it is generally accepted that local authorities have a duty to ensure compliance with the provisions of the Building Standards Act and similar legislative instruments. Section 21 of the Building Standards Act provides, for example, that the local authority can approach the magistrates' court for an order to prevent any person from erecting a building that does not comply with the provisions of the Act. The local authority can also apply for a demolition order for any building that does not comply with the provisions of the Act. Recent case law where the courts emphasised the duty of the local authority to enforce legislation includes *Ruck v Makana Municipality and others*[145] where, with reference to *Odendaal v Eastern*

[143] 1985 (3) SA 979 (T) 987I. The exact words of the court were: '[e]k kan nie toelaat dat sulke willekeurige optrede van individue die hele administrasie van die skema in chaos dompel nie'.

[144] *Barnett and others v Minister of Land Affairs and others* 2007 (6) SA 313 (SCA)*; City of Tshwane v Ghani* 2009 (5) SA 563 (T); *Standard Bank of South Africa Ltd v Swartland Municipality and others* [2010] ZAWCHC 103 (31 May 2010) and *Standard Bank of South Africa Ltd v Swartland Municipality and others* [2011] ZASCA 106 (1 June 2011).

[145] [2010] ZAECGHC 111 (24 November 2010).

Metropolitan Local Council,[146] the court explained that legislation such as zoning laws imposes onerous duties on local authorities. The purpose of these duties, as well as the powers bestowed on local authorities, is to ensure 'that the objectives of the legislative instruments are achieved' and 'that there is a balance of interests within a geographical community'.[147] Moreover, the local authority is the guardian of the community's interest and the individual interests of the property owners in its jurisdiction. Towards the conclusion of the judgment the court reminded the municipality that it has a duty to order the cessation of the further construction of illegal structures and to order the demolition of such a building if necessary. Likewise, in *Liebenberg v Frater NO and others, Drakenstein Municipality v Frater NO and others*[148] the court confirmed that the municipality has a *prima facie* right to enforce compliance with the zoning scheme as and with the Building Standards Act. This right is born from the fact that the municipality administers the zoning scheme in its area of jurisdiction as prescribed by section 39 of the Land Use Planning Ordinance 15 of 1985. The municipality also has a duty to ensure compliance with the Building Standards Act.[149] By virtue of their statutory duties, local authorities therefore have *locus standi* to enforce compliance with the law.[150]

Cilliers, Loots and Nel further explain that a private person will also have standing to enforce compliance with legislation in three instances.[151] Firstly, if the legislation was enacted in the interest of a specific class of persons, any member of that class can enforce compliance with that law, regardless of whether the person was negatively

[146] [1999] CLR 77 (W) 84-84.

[147] [2010] ZAECGHC 111 (24 November 2010) paras 21 and 39.

[148] [2010] ZAWCHC 203 (23 September 2010).

[149] [2010] ZAWCHC 203 (23 September 2010) para 18.

[150] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume II 5 ed (2009) 1476.

[151] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume I 5 ed (2009) 192. The first two instances were developed in *Patz v Green* 1907 TS 427 at 433. It is generally referred to as the *Patz v Green* test.

affected by non-compliance.[152] Secondly, if legislation was enacted in the public interest, any member of the public will be able to enforce compliance with legislation, provided that he can show that he was adversely affected by the non-compliance with the law.[153] Finally, if legislation is designed to protect a constitutional right, a property owner will have the standing to enforce compliance by virtue of section 38 of the

[152] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume I 5 ed (2009) 192, with reference to the authoritative case of *Patz v Green* 1907 TS 427 at 433. In *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 96, the court confirmed that if legislation is designed to benefit a specific class of people, a member of that class can enforce compliance without special proof of damage.

[153] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume I 5 ed (2009) 192 with reference to *Patz v Green* 1907 TS 427 at 433. Loots C '*Locus standi* to claim relief in the public interest in matters involving the enforcement of legislation' (1987) 104 *SALJ* 131-148 at 145 and 130 criticises this leg of the *Patz v Green* test because it does not draw a distinction between actions brought to vindicate personal interests and actions brought in the public interest. Essentially, she argues that the *Patz v Green* test is not absolute and that it must sometimes yield to the intention of the legislature. Some laws are enacted with the intention to protect or regulate a specific matter of public interest. Loots argues that such laws 'may be said to create rights vesting in each member of the public'. In such circumstances a member of the public will have *locus standi* if there was an infringement of a right or a reasonable apprehension that the right will be infringed; the legislature intended the remedy concerned to be available and where the legislature intended that any member of the public could enforce such a remedy. Loots contends that such a public interest action can have potentially far-reaching consequences for, for example, the enforcement of environmental legislation. Specifically, she explains that interested organisations can defend the public interest by enforcing environmental laws where local authorities are unwilling or unable to implement the law.

Constitution.[154] Legislation is often enforced by way of an interdict. A person will have *locus standi* to obtain an interdict if he meets the requirements of the *Patz v Green*[155] test, provided that the legislation does not protect a constitutional right.[156] If the legislation protects a constitutional right, neighbouring land owners will have standing to apply for an interdict on the basis of section 38 of the Constitution.[157]

The South African courts have recognised the standing of neighbouring property owners to enforce compliance with the provisions of a town-planning or zoning

[154] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume I 5 ed (2009) 193. The final instance is not irrelevant to this discussion. With reference to *Barnett and others v Minister of Land Affairs and others* 2007 (6) SA 313 (SCA), it is argued below that illegal development can cause irreparable harm to the environment. This can amount to a violation of section 24 of the Constitution. Section 24(b) of the Constitution states that anyone has the right to 'have the environment protected, for the benefit of present and future generations, through reasonable legislative and other means that (i) prevent pollution and ecological degradation; (ii) promote conservation and (iii) secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development'. On the basis of section 38 of the Constitution property owners will have *locus standi* to protect their right to a healthy environment. They would do so by applying for either a prohibitory or mandatory interdict. A prohibitory interdict compels a property owner to cease with the construction of an illegal building. Property owners would then apply for a mandatory interdict to compel the builder to demolish the illegal structure and to rehabilitate the environment. Furthermore, section 33 of the Constitution provides that '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair'. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) was enacted to give effect to this constitutional provision. Section 6 of PAJA provides that anyone can approach a court or a tribunal for the judicial review of administrative action. Essentially, this provisions extends standing to neighbouring land owners who can have the local authority's decision set aside on review if, for example, it was taken despite a procedural irregularity. Section 6 of PAJA lists a range of grounds on which administrative actions can be set aside on review. PAJA is therefore another way in which neighbouring land owners can enforce compliance with the law.

[155] 1907 TS 427.

[156] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume I 5 ed (2009) 195-196.

[157] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume I 5 ed (2009) 195-196.

scheme.[158] In recent case law, the courts confirmed the standing of neighbouring property owners to approach the court for relief in circumstances where a neighbour had built, or was in the process of building, an illegal structure.[159] The applicants in *Neves and Others v Merlico 148 CC and another* (*Neves*)[160] sought and obtained an urgent interdict to prevent the respondent from continuing with the construction of illegal building works on the neighbouring property.[161] They then applied to the court for final interdictory relief.[162] The court decided that the applicants had a clear right to require the first respondent to comply with the provisions of the Building Standards Act and the zoning scheme regulations that regulated development in the area. It was evident that the applicants had a reasonable apprehension that the illegal structures would interfere with their right to privacy.[163] An interdict was the only way in which the applicants' rights

[158] *BEF (Pty) Ltd v Cape Town Municipality and others* 1983 (2) SA 387 (C); *Bedfordview Town Council and Strydom R and another v Mansyn Seven (Pty) Ltd and others* 1989 (4) SA 599 (W)*; Pick and Pay Stores Ltd and others v Teazers Comedy and Revue CC and others* 2000 (3) SA 645 (W); *PS Booksellers (Pty) Ltd and another v Harrison and others* 2008 (3) SA 633 (C) paras 16-20 and *Tergniet and Toekoms Action Group and 34 others v Outeniqua Kreosootpale (Pty) Ltd and others* [2009] ZAWCHC 6 (23 January 2009) para 22.

[159] In *Muller NO and others v City of Cape Town* 2006 (5) SA 415 (C) para 73 the court, although not specifically referring to *locus standi*, stated that adjoining property owners have a right to insist that a neighbouring property owner should adhere to statutory provisions when developing his property.

[160] [2010] ZAWCHC 115 (14 April 2010).

[161] [2010] ZAWCHC 115 (14 April 2010) paras 1, 6 and 7. The first respondent had purchased its property with the intention of constructing a retail and residential complex on the property. Specifically, the respondent planned to build residential flats with balconies on the garage of the building. The respondent further had the intention of building swimming pools and braai facilities in the balcony areas. To do so the respondent had to obtain a formal departure in terms of Land Use Planning Ordinance 1985 for which he required the consent of the applicant. The applicant refused the give her consent for the departure application and as a result the respondent submitted building plans without referring to the balconies and the braai facilities. These plans were approved and the respondent continued with its development of its property, including the construction of the balcony areas.

[162] [2010] ZAWCHC 115 (14 April 2010) para 6.

[163] [2010] ZAWCHC 115 (14 April 2010) para 8.

could be adequately protected.[164] Likewise, in *Liebenberg v Frater NO and others, Drakenstein Municipality v Frater NO and others* (*Liebenberg v Frater*)[165] the applicant sought a permanent interdict to prevent the fourth respondent (the Trust) from building any illegal structures on its property.[166] The Trust had submitted building plans as required by the Building Standards Act, but these plans were not approved. It continued building operations on its property in blatant disregard of the law.[167] One of the issues in dispute was whether the applicant, as a neighbouring property owner, had the requisite *locus standi* to approach the court for relief. The court held that the applicant would have *locus standi* if she met two requirements. Firstly, she had to show that she has a direct interest in the matter. Secondly, she had to show that she was able to vindicate a right which she possesses in her own right and not merely a right that all citizens

[164] [2010] ZAWCHC 115 (14 April 2010) para 8. Recently, in *Standard Bank of South Africa Ltd v Swartland Municipality and others* [2010] ZAWCHC 103 (31 May 2010) the court had to decide whether a bank, which held two mortgage bonds over a property on which an illegal structure was erected, should have been joined as a party to the proceedings were the demolition of that structure was ordered. The court decided that the bank should not have been joined as a party to the proceedings. One of the reasons for this decision was that the bank did not have the *locus standi* to approach the court for relief. This decision was overturned in *Standard Bank of South Africa Ltd v Swartland Municipality and others* [2011] ZASCA 106 (1 June 2011), where it was concluded that the bank should have been joined as a party to demolition proceedings. The court confirmed that the bank had a direct and substantial interest in the outcome of the demolition proceedings because it was likely to affect the value of the property. Furthermore, the demolition of the structures could impact on the possibility of selling the property. On the basis of these decisions one can deduce that the bank had a right to be joined in the application for the demolition order. However, the court did not specifically confirm that the bank had *locus standi* to prevent the demolition of the illegal structure.

[165] [2010] ZAWCHC 203 (23 September 2010).

[166] [2010] ZAWCHC 203 (23 September 2010) paras 2 and 3-4. The Drakenstein Municipality had in separate proceedings applied for an interim interdict to, amongst other things; restrain the fourth respondent from constructing any buildings until it had obtained the necessary permission. The court exercised its discretion to consolidate the two applications.

[167] [2010] ZAWCHC 203 (23 September 2010) para 7.

possess.[168] It was decided that the applicant had the *locus standi* to bring the application for the interdict, despite the fact that she had also erected an illegal structure on her property.[169] Finally, in light of decisions such as *PS Booksellers (Pty) Ltd and another v Harrison and others*[170] and *Tergniet and Toekoms Action Group and 34 others v Outeniqua Kreosootpale (Pty) Ltd and others*[171] one can infer that voluntary associations have the standing to act on behalf of land owners in the township who seek relief in circumstances where an illegal building has been erected in the neighbourhood.

To conclude, it remains the local authorities' responsibility to enforce compliance with laws such as the Building Standards Act in their area of jurisdiction, if necessary by way of a demolition order. However, case law has recognised that land owners in a township will also have the standing to approach the court for an interdict to prevent the continuance of illegal building and development, in instances where local authorities have, for whatever reason, failed to enforce the law. Moreover, the courts have recognised the standing of voluntary associations to approach the court for relief on behalf of land owners in a township.

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[168] [2010] ZAWCHC 203 (23 September 2010) para 9. The court cites *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87 at 101, as well as *Glass v Glass* 1980 (3) SA 263 (W) at 266H, as authority for the second requirement.

[169] [2010] ZAWCHC 203 (23 September 2010) paras 9 and 12. The Trust raised the 'clean hands doctrine' as a defence to the application for an interdict. In this regard the court explained that the doctrine was an English law concept that was similar to the Roman-Dutch maxim of *in pari delicto potior est condition possidentis vel defendentis* (the *par delictum* rule). The court cites *Afrisure CC and another v Watson No and another* 2009 (2) SA 127 (SCA) para 39, where the court held, with reference to *Jajbay v Cassim* 1939 AD 537, that the *par delictum* rule has been relaxed. Under the circumstances the court decided that it could not prevent the applicant from protecting her interest.

[170] 2008 (3) SA 633 (C) 638G-639E. Refer to section 3 2 3 above where this case is briefly discussed.

[171] [2009] ZAWCHC 6 (23 January 2009) para 22.

3 3 2 2 Protecting the public interest

In *Barnett and others v Minister of Land Affairs and others* (*Barnett*)[172] the Supreme Court of Appeal (the court) upheld a demolition and eviction order granted by the court *a quo*.[173] Specifically, the demolition order was granted in respect of holiday cottages[174] that had been erected in contravention of an environmental conservation decree. This decree was promulgated by the President of the Transkei in July 1992 and put into operation on 1 January 1993.[175] The essence of the decree was to declare 'all State land situated on the landward side of the entire Transkeian coast within a strip of one

[172] 2007 (6) SA 313 (SCA). Refer to Van der Walt AJ 'Constitutional property law' (2007) 4 *JQR* 2.3, Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 35-36 and Van der Walt AJ *The law of neighbours* (2010) 342 footnote 13 for a discussion of this case.

[173] 2007 (6) SA 313 (SCA) 315F-G. The court *a quo* ordered the eviction of the defendants and the demolition of holiday cottages (situated on the Transkei Wild Coast) within four months on the grounds that the sites formed part of state land. Upon the expiry of the four month period the respondents (referred to as the government) were authorised to demolish the cottages at the defendants' expense.

[174] 2007 (6) SA 313 (SCA) 316D-317F. These cottages were erected by the 16 defendants (mostly farmers and businessmen) within a month after the Transkei was declared part of the Republic of South Africa. The defendants obtained the land (upon which they built the cottages) by consulting with the local tribal headman, Chief and Tribal Authority in the following manner: they first informed the local headman of their desire to possess a specific site, whereafter they were taken to the Chief for his approval. The defendants usually brought a gift of brandy to the Chief. After the defendants had obtained the Chief's approval they met with the Tribal Authority. The Tribal Authority approved the request and the defendants paid a 'customary fee' of R200. They were issued a receipt, signed by the secretary of the Authority, which was described as a 'fishing site licence application'. The heading of the document indicated that it had to be taken to the local magistrate. It was evident that the document informed the magistrate that the Tribal Authority had approved an application for a fishing licence. This document was taken to an official of the Department of Agriculture who had an office at the magistrate's court. The official arranged the time when the defendants, the Chief, and some members of the local tribe would meet at the sites. At the meeting the sites were demarcated with reference to certain landmarks. The Chief asked the community whether they had objections to the sites. There were no objections and consequently the consent to build on the land was given. Shortly after the sites were set out the 'festivities' began - the defendants supplied food and drink to all who were present at the meeting.

[175] 2007 (6) SA 313 (SCA) 315I.

kilometre above the high-water mark, a coastal conservation area'.[176] Development within the conservation area by any person (including the state) was strictly prohibited, unless a permit had been obtained from the Department of Agriculture and Forestry.[177] The government relied on the decree as a main cause of action and argued that the structures should be demolished on the ground that the defendants had constructed cottages in a conservation area without first having obtained a permit.[178] Evidence of the damage caused by the defendants' activities in the conservation area was provided. In particular, reference was made to the damage caused by the use of four-wheel drive vehicles on the dunes and on the beach. The defendants had caused damage to the dunes by constructing their cottages too close to the high-water mark. In the construction process the defendants had also cleared away coastal forest and these open areas, together with the cottages, interfered with the formerly untouched natural landscape. It was submitted that the only way in which the area could be rehabilitated was by demolishing and removing the cottages from the area.

The court in *City of Tshwane v Ghani*[179] granted an interdict prohibiting the respondents from occupying five erven, four of which were owned by the applicant. In so doing the court upheld not only the public interest in the regulation of building works, but also the health and safety interests of the respondents' employees and of the public in general.[180] The court also granted an interdict that prohibited the respondents from

[176] 2007 (6) SA 313 (SCA) 316A, 319A-C. The decree remained in force on the ground of section 229 of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution).

[177] 2007 (6) SA 313 (SCA) 316B.

[178] 2007 (6) SA 313 (SCA) 315J, 316B-C, 319B-I, 322G. The government relied, as an alternative cause of action, on a common-law ground, namely that the defendants had unlawfully occupied and possessed state-owned land. In this regard, the court explained that it was common cause that land occupied by the appellants formed part of state-owned land since the land was 'never transferred into private ownership'.

[179] 2009 (5) SA 563 (T). Refer to Van der Walt AJ *The law of neighbours* (2010) 341-343, footnotes 11, 13 and 17 for a discussion of this case.

[180] 2009 (5) SA 563 (T) 567C-D. The applicant submitted, in support of its urgent application, that the health of the public was jeopardised by the fact that a building had been constructed in contravention of building regulations.

trading from the premises owned by the city.[181] The central issue in this case was that the respondents had, in an act of piracy, taken possession of the five erven without first purchasing them.[182] The respondents built a retail store on the premises, without submitting building plans as required by section 4 of the Building Standards Act.[183] It is also likely that, since the respondents had bypassed all statutory processes, the building was built in contravention of other laws such as health and safety by-laws.

Similarly, in *Liebenberg v Frater*,[184] the municipality obtained an interim interdict to prevent the Trust from continuing with the illegal construction of buildings on its property.[185] The court also awarded an interim interdict to prevent the Trust from operating a restaurant on the property. From the scant information provided in the report one can deduce that the local authority had refused to approve building plans submitted

[181] 2009 (5) SA 563 (T) 565A-F. Ghani was the director of the second respondent (Kwik Property Holdings (Pty) Ltd) and the third respondent (Kwik Kat Cash and Carry (Pty) Ltd). Both companies were under the control of the first respondent.

[182] 2009 (5) SA 563 (T) 566A-B. The applicant and the respondents were in the process of negotiating a price for the transfer of ownership of the four plots. As to the fifth plot, the respondents had attempted to acquire the plot, but the transaction was not completed.

[183] 2009 (5) SA 563 (T) 566-I, 569B, with reference Act 103 of 1997. This store was in operation at the time of the application and employed about 100 employees. During the process of construction a notice was issued, in terms of regulation 25(10) of the National Building Regulations and Building Standards Act 103 of 1977, that informed the second respondent that it was unlawfully constructing a building and 'without the prior approval' of the relevant authority. The second respondent proceeded with the construction of the building despite this notice. Two subsequent notices were issued to the second respondent before he lodged building plans for approval with the local authority. After having received yet another notice, the second respondent launched an urgent application for an order that prevented the applicant from interfering with its occupation and use of the five erven, pending the approval of the building plans. This application was struck from the roll as it lacked urgency. Further, the building plans were rejected on the grounds that they had not been submitted by the registered owner of the erf.

[184] [2010] ZAWCHC 203 (23 September 2010).

[185] [2010] ZAWCHC 203 (23 September 2010) paras 3 and 16. The Drakenstein municipality's application was consolidated with the Liebenberg application. The applicant in the latter application sought and obtained a permanent interdict to prevent the Trust from erecting illegal structures on its property. The operation of this interdict was temporarily suspended to afford the employees of the restaurant time to show why the interdict should not be made final.

by the Trust. This did not deter the Trust from proceeding with the renovation of one building and the construction of another building on its property.[186] The Trust then continued to conduct a restaurant in the renovated building, without first obtaining an occupancy certificate or a trading licence and without complying with various statutory provisions pertaining to hygiene and safety.[187] By granting the interim interdict the court protected not only the interests of neighbouring property owners but also the interests of the patrons and employees of the restaurant.

Both *City of Tshwane v Ghani* and *Liebenberg v Frater* are relevant to a discussion of demolition orders because they indicate that there is a possibility that the respective local authorities may apply to the magistrates' courts for demolition orders as required by section 21 of the Building Standards Act.[188] The local authorities have a statutory duty to enforce compliance with the provisions of the Building Standards Act and this may mean that illegal structures will be demolished. Furthermore, the public has an interest in the strict enforcement of the law, which might entail the demolition of illegal structures. This is in line with the view expounded in *Standard Bank of South Africa Ltd v Swartland Municipality and others* (*Swartland Municipality*).[189] In that case the court held that the actions of the third respondent (who built the illegal structures) were *contra bonos mores* and contrary to public policy.[190] The court held that it could not set aside the demolition order because that would militate 'against the doctrine of legality, which forms an important part of our legal system and more especially since the Constitution became the Supreme Law of the country'.[191] In *Barnett and others v Minister of Land Affairs and others* (*Barnett*),[192] it was clear that the only way in which the public interest in the protection and rehabilitation of the environment could be upheld was by granting a demolition order. Moreover, the public interest in the regulation of building operations

[186] [2010] ZAWCHC 203 (23 September 2010) para 7.

[187] [2010] ZAWCHC 203 (23 September 2010) para 5.

[188] Section 21 of Act 103 of 1977.

[189] [2010] ZAWCHC 103 (31 May 2010). For a discussion of this case, refer to Van der Walt AJ 'Constitutional property law' (2010) 2 *JQR* 2.4.1

[190] [2010] ZAWCHC 103 (31 May 2010) para 22.

[191] [2010] ZAWCHC 103 (31 May 2010) para 22.

[192] 2007 (6) SA 313 (SCA).

was best served by the granting of a demolition order, since it confirmed that the court will not tolerate the construction of buildings in direct contravention of the law.

3 3 2 3 The supervisory role of the court

In *United Technical Equipment Co v Johannesburg City Council*,[193] the court held that the local authority (the Johannesburg City Council) had not only a statutory duty but also a moral duty to uphold the law that regulates building in its jurisdiction. The court stated that it would be wrong of a local authority to whittle away its obligation to uphold the law. A lenient approach by the local authority could be an invitation to the public to 'use land illegally with the hope that the use will be legalised in due course...'.[194]

The cases discussed above show that the courts will compel the local authorities to enforce compliance with legislation by ordering the demolition of illegal buildings. Alternatively, the courts will assist the local authorities to enforce building and development laws in their area of jurisdiction. In *City of Tshwane v Ghani* the court held that many local authorities struggle to perform their duties due to financial and organisational constraints. It would be 'utterly wrong' of the court not to assist the local authority to perform its duties, 'particularly when the proper execution thereof is sought to be thwarted with as much cynical disregard of the law as is the case here'.[195] In *Barnett* the court ordered the demolition of the illegal structures and in so doing compelled the local authority to enforce the provisions of the Proclamation.

3 3 2 4 The attitude and intent of the builder as a decisive factor

The *Barnett* and *City of Tshwane v Ghani* cases show that the courts will not necessarily consider the value of an illegal structure when it decides whether that structure should be demolished. However, the court will consider the attitude and the

[193] 1987 (4) SA 347 (T) 348H.

[194] 1987 (4) SA 347 (T) 348H.

[195] 2009 (5) SA 563 (T) 568D-E.

intention of the builder.[196] In support of their plea that it would be unjust and unfair to evict them, the defendants in *Barnett* drew the court's attention to the fact that they would lose the money, time and labour, which they had invested in the cottages.[197] In response, counsel for the government argued that the court should also consider the fact that the defendants (who were all literate and 'sophisticated' people) had, despite 'glaring incongruities' such as the fact that the sites had been obtained for R200 and the fact that the land was allocated in a 'cavalier' fashion, deliberately chosen to ignore the law and proceed with their illegal conduct.[198] The court agreed with this argument and held that the 'considerations of justice and equity did not favour the defendants'.[199]

In *City of Tshwane v Ghani* the respondents attempted to persuade the court to condone his actions and grant him an order for transfer of the property.[200] The court held that it was evident that the respondents had knowingly contravened the law in an attempt to obtain properties owned by the local authority and indirectly by the public. Besides, the respondents intended to approach the applicant with a *fait accompli* to coerce the local authority to transfer the property to them.[201] With reference to *Malan v Ardconnel Investments (Pty) Ltd*[202] and *United Technical Equipment Co (Pty) Ltd v*

[196] In *Standard Bank of South Africa Ltd v Swartland Municipality and others* [2010] ZAWCHC 103 (31 May 2010) paras 6 and 21-22; *Neves and others v Merlico 148 CC and another* [2010] ZAWCHC 115 (14 April 2010) para 8 and *Liebenberg v Frater NO and others, Drakenstein Municipality v Frater NO and others* [2010] ZAWCHC 203 (23 September 2010) para 14 the courts placed emphasis on the attitude and intent of the owner on whose property illegal structures were built.

[197] 2007 (6) SA 313 (SCA) 326C.

[198] 2007 (6) SA 313 (SCA) 326F-G.

[199] 2007 (6) SA 313 (SCA) 327A-B.

[200] 2009 (5) SA 563 (T) 567D.

[201] 2009 (5) SA 563 (T) 567E.

[202] 1988 (2) SA 12 (A) 40E-F.

Johannesburg City Council[203] the court stated that it is 'obliged to set its face sternly against actions that are as blatantly and brazenly in conflict with the law as those the respondents have committed'.[204] The respondents had taken possession of the properties despite being aware of the local authority's ownership and in so doing it had 'persistently, knowingly and designedly acted in transgression of the law'.[205]

The respondents further attempted to intimidate the court by explaining that the Premier of Gauteng had agreed to investigate and to intervene in 'this most sensitive issue'.[206] In a letter addressed to the court the respondents requested a four week extension of the final order so as to afford the premier sufficient time to conduct his investigation.[207] The court held that 'the letter is regrettable in the extreme for its apparent assumption that real or perceived political connectivity may somehow excuse any disregard of or lack of respect for, the law and the consequences thereof'.[208] Furthermore, the respondents' request required the court to 'shrink from its duty of enforcing the law and to kowtow to political intervention to save the wilful transgressor of the law from the consequences of his or its unlawful conduct'.[209] The respondents' suggestion undermined the integrity of South Africa's constitutional dispensation and the independence of the judiciary.[210] The court concluded that the respondents' request

[203] 1987 (4) SA 343 (T) 348E-349F. Specifically, the court referred to statements made by Harms J in *United Technical Equipment Co (Pty) Ltd* 1987 (4) SA 347 (T) 348E-349F, when he had to consider a suggestion that an interdict (granted to the local authority) should be suspended for the benefit of the applicants. Harms J stated that it was incorrect for the applicants to rely on a *fait accompli* created by their own unlawful actions. Further, the local authority has a statutory and a moral duty to uphold the law and to enforce compliance with the planning scheme. A lenient approach adopted by the local authority with regard to the enforcement of the scheme could invite other members of the public 'to use land illegally with the hope that the use will be legalised in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict'.

[204] 2009 (5) SA 563 (T) 567F-G.

[205] 2009 (5) SA 563 (T) 567F.

[206] 2009 (5) SA 563 (T) 569.

[207] 2009 (5) SA 563 (T) 570.

[208] 2009 (5) SA 563 (T) 570E.

[209] 2009 (5) SA 563 (T) 570F.

[210] 2009 (5) SA 563 (T) 570F.

should be 'rejected unreservedly'.[211] *City of Tshwane v Ghani* has therefore made it clear that the courts will not look kindly on land owners who deliberately build in disregard of the law. One can deduce that instances where the owner built a structure in blatant disregard of the law, the courts will not hesitate to order the demolition of illegal structures, and in so doing, to uphold the principle of legality.

3 3 3 Conclusion

It is evident from the discussion above that local authorities have a duty to enforce compliance with legislation that regulates building and development. Case law has shown that neighbouring property owners who can show that they will be adversely affected by an illegal structure will have legal standing to approach the court for either a prohibitory or a mandatory interdict or both. Neighbouring property owners can therefore apply for a demolition order (mandatory interdict) to compel the removal of an illegal structure.

Cases such as *Barnett* and *Swartland Municipality* show that the courts are not willing to come to the aid of a land owner who erects a structure in disregard of the law. This means that the courts will not hesitate to order the demolition or partial demolition of illegal structures. Factors such as the financial implications for the owner of the illegal building are irrelevant to the extent that they are the cause of their own loss in cases of illegal building. The court in *Barnett* ordered the demolition of entire holiday cottages built in disregard of legislation. Similarly, the court in *Swartland Municipality* ordered the demolition of a garage and a storeroom that was built without approved building plans. It is also likely that the court will order the partial demolition of a building insofar as it contravenes the provisions of the Building Standards Act. The *Neves* case is an example of where the court ordered the demolition of balconies and braai facilities that were not approved by the local authority. Likewise, *Liebenberg v Frater* raises the possibility that the local authority will apply for a demolition order to remove those parts of the buildings which do not meet legal requirements.

[211] 2009 (5) SA 563 (T) 570F.

A demolition order might seem harsh. However, the granting of the demolition order is often the only effective way in which the court can protect the respective interests involved. It was explained above that the demolition of an illegal structure would uphold the public interest in the orderly and safe development of built-up areas. In circumstances where a building is built illegally in an environmentally sensitive area, a demolition order upholds the public interest in a protected environment. Moreover, by ordering the demolition of an illegal structure the court protects the public interest in the rule of law. The demolition of an illegal structure has deterrent value as it can discourage any other person who intends to build structures in disregard of the law. On a local level, the demolition of an illegal structure can contribute toward preserving the unique character of residential areas. This in turn will protect neighbouring property owners' financial investment in their neighbourhood.

All the cases discussed above illustrate the supervisory role adopted by the courts. Decisions such as *Barnett* show that there are instances where the court will compel the local authority to enforce the law, if necessary by ordering the demolition of illegal structures. In other instances, the court will grant a remedy, such as an interdict, to enable the local authority to meet its statutory responsibilities. Importantly, from *Camps Bay Ratepayers and Resident's Association v Harrison*[212] one can deduce that there are exceptional instances where the courts will refuse to order the demolition of illegal building works. This decision is discussed in greater detail in section 3 5 2 below. At this stage it suffices to say that certain factors can have an influence on the court's decision.

[212] [2010] ZASCA 3 (17 February 2010). For a discussion of this decision, refer to Van der Walt AJ 'Constitutional property law' (2010) 1 *JQR* 2.1.1.

3 4 The right of neighbouring property owners to have building plans set aside on review and to have the unlawful buildings demolished

3 4 1 Introduction

In *Muller and others v City of Cape Town and another*[213] the court explained that it is 'trite law' that ownership is the most comprehensive right 'which a person can have with regard to a corporeal thing'.[214] Furthermore, an owner has the right to develop his property 'to any permissible optimal level'.[215] Ownership entitlements such as the right to develop can, however, be restricted by law of general application such as the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act), town-planning ordinances and zoning-scheme regulations.[216] A land owner does not have the right to develop his property in a manner that contravenes the law or that 'adversely affects the rights of owners of adjoining or neighbouring properties'.[217] The court explained that owners of adjoining properties have a right to insist that statutorily imposed restrictions on building in a specific area 'be adhered to inclusive of a right not to have plans passed in respect of an adjoining property in circumstances where the statute prohibits the passing of such plans'.[218]

The Constitutional Court in *Walele v The City of Cape Town and others*[219] stated that a balance has to be struck between the right of a property owner to build on his property and the rights of neighbouring property owners who are negatively affected by

[213] 2006 (5) SA 415 (C). Refer to Van der Walt AJ *The law of neighbours* (2010) 368-367 for a discussion of this case.

[214] 2006 (5) SA 415 (C) para 72.

[215] 2006 (5) SA 415 (C) para 73.

[216] 2006 (5) SA 415 (C) para 72.

[217] 2006 (5) SA 415 (C) para 74.

[218] 2006 (5) SA 415 (C) para 73.

[219] 2008 (11) BCLR 1067 (CC). Refer to Van der Walt AJ 'Constitutional property law' (2008) 3 *JQR* 2.1, Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 33-34 and Van der Walt AJ *The law of neighbours* (2010) 346-349 and 351-355 for a discussion of this important decision.

the building.[220] This balance has to be achieved within the framework of the Building Standards Act. The implication of this statement is that the Building Standards Act provides a framework in terms of which property owners can lawfully develop their properties by obtaining approved building plans as required by section 4 of the Act. The protection afforded to neighbouring property owners by the Building Standards Act is twofold in the sense that it protects the rights of neighbouring property owners before as well as after the approval of the building plans. Neighbours are protected prior to the approval of building plans because the Act prescribes a series of requirements to be complied with prior to approval of building plans. A measure of protection is also afforded to neighbours once plans have been approved, since the Act enables them to apply for the review and setting aside of approved building plans under certain conditions. Neighbouring property owners can, in certain circumstances, apply for a demolition order once building plans have been set aside on review, thereby rendering the completed or partial building works illegal.

The purpose of this discussion is to sketch the procedure that a neighbouring property owner has to follow to have his neighbour's approved building plans set aside on review. This section will first outline the relevant provisions of the Building Standards Act; whereafter consideration will be given to the remedy of the interim interdict. In the third section the grounds of review as set out in the Building Standards Act are discussed with reference to case law. There are instances where neighbouring property owners' rights can only be vindicated by the demolition of the building insofar as it cannot be brought in line with the provisions of the Building Standards Act. It will be shown, with reference to case law, that in such instances the courts have confirmed that the local authority has a statutory duty to order the demolition of a building, or parts of a

[220] In *Odendaal v Eastern Metropolitan Local Council* 1999 CLR 77 (W) 84-85 the court concisely explained that local authorities have a statutory duty to ensure that areas are developed in 'as efficient, safe and aesthetically pleasing way as possible'. Local authorities must also protect the interests of property owners in their jurisdiction. That is why rights and powers of owners in relation to their property are limited. Property owners in South Africa have never had unfettered powers over their property. Rapid urbanisation and the 'inevitable need' for regulation have placed even more extensive limitations on ownership entitlements.

building, for which there are no approved building plans. The concluding section briefly explains the implications of the *Oudekraal*[221] principle. At this stage it suffices to say that, due to the operation of the *Oudekraal* principle, the court has a discretion to refuse an application for a demolition even in circumstances where applicants have established a clear right to such an order.

3 4 2 General overview of sections 4, 6 and 7 of the Building Standards Act 103 of 1977

Property owners must first obtain building plans as required by section 4 of the Building Standards Act before they can proceed to build on their land. Section 4(1) of the Building Standards Act provides that:

> '[n]o person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act'.

In terms of section 5(1) of the Building Standards Act, the local authority must appoint a building control officer responsible for making recommendations[222] to the local authority in respect of building plans and other documents. The local authority can approve building plans once it has received the recommendation from the building control officer and if it is satisfied that the plans comply with section 7(1)(a) and section 7(1)(b). In *Walele v The City of Cape Town*[223] the Constitutional Court confirmed that neighbours do not have a general right to be heard when their neighbours applies for the approval

[221] *Oudekraal Estates (Pty) Ltd v City of Cape* Town *and others* 2004 (6) SA 222 (SCA).

[222] Section 6(1)(a) of Act 103 of 1977 provides that the building control officer shall 'make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4(3)'.

[223] 2008 (11) BCLR 1067 (CC).

of building plans.[224] The principal reason for this is that section 7 of the Building Standards Act contains a 'self-contained protection which safeguards the rights of owners of neighbouring properties'.[225] It is therefore unnecessary to hear neighbouring land owners before the approval of building plans. Explained differently, neighbouring

[224] 2008 (11) BCLR 1067 (CC) paras 22-45. One of the grounds on which the applicant challenged the decision of the first respondent to approve the building plans was that the decision was procedurally unfair, arbitrary and capricious. The court explained that the *audi alterem partem* principle was the most important element of procedural fairness. This principle requires that parties that are likely be affected by administrative decisions must be given the opportunity of a hearing before the decision is taken. Under the common law the *audi alteram partem* principle was developed to protect existing rights as well as legitimate expectations. Section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is the statutory embodiment of the *audi alteram partem* principle. The applicant in *Walele v The City of Cape Town* had to prove that the decision to approve the building plans 'materially and adversely affected his rights or legitimate expectations' as required in section 3 of PAJA. The court determined that the applicant's case was based on the argument that the erection of the building would cause his property to lose value. Therefore, the applicant did not attack the administrative decision, namely the decision to approve the building plans. The court held that 'administrative action' as intended in section 3 of PAJA could not be interpreted to include the erection of the buildings. The court explained that it was unnecessary to afford such a wide reading to section 3 of PAJA because section 7 of the Building Standards Act enabled the applicant to challenge the approval of the building plans, an administrative action, on review. In light of these considerations the court concluded that the applicant was unable to prove that the erection of the building on the respondents' property would cause his property to lose value. The applicant argued that he had a legitimate expectation to be heard because the city had on a previous occasion created the opportunity for a hearing. Further, the applicant contended that the building works on the respondents' property would 'cast a large shadow in the winter'. The court held the applicant failed to prove that the city had a regular practice of granting neighbours the right to participate in pre-approval hearings. Furthermore, the court decided that the fact that a person was the owner of the neighbouring property did not 'give rise to an expectation to be heard'.

[225] 2008 (11) BCLR 1067 (CC) para 56.

property owners do not have a right to participate in the approval process.[226] However, neighbouring land owners do have the right to have building plans set aside on review on the basis of one of the grounds listed in section 7 of the Building Standards Act or section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[227] In this regard the Constitutional Court in *Walele* explained that building plans can be set aside on review if they are approved despite the presence of a disqualifying factor listed in section 7(1)(b) of the Building Standards Act.[228] In summary, *Walele* confirmed that neighbouring land owners do not have a general right to be heard prior to the approval of their neighbours building plans but they do have the right to have approved building plans set aside on review on the basis of section 7(1)(b) of the Building Standards Act, or alternatively, on the basis of section 6 of PAJA.

Section 7(1)(a) of the Building Standards Act provides that the local authority must be certain that the approved building plans will comply with 'the requirements of this Act and any other applicable law'.[229] After having considered the provisions of section 7(1)(aa) the local authority must assess the building plans in light of the grounds in

[226] Although the court explained in *Walele v The City of Cape Town and others* 2008 (11) BCLR 1067 (CC) para 71 that it would be helpful for the building control officer, at the stage when he is compiling the recommendation, to invite neighbouring property owners to make representations of the potential impact that the development might have on their properties. This would drastically reduce the possibility of plans being approved that would trigger one of the disqualifying factors listed in section 7 of the Building Standards Act. The existence of disqualifying factors could result in the plans being set aside on review, even though the owner had already commenced building in accordance with the plans. In *The Camps Bay Residents and Ratepayers Association and other v Hartley and others* ZAWCHC 198 (2 September 2010) paras 36-37 the court explained that the 'unwholesome situation of a partly completed building standing unattended for months while litigation took its course could also have been avoided if the local authority had heeded the advice given' in *Walele*. The court stated that this advice would aid the local authority in fulfilling the local government's objective in terms of section 152 of the Constitution. There was no reason why the building plan applicant should not bear the financial and logistical burden of obtaining the permission of his neighbours.

[227] Section 6 of the Promotion of Administrative Justice Act 3 of 2000 lists a range of grounds on which administrative action, in this case, the decision to approve building plans, can be set aside on review.

[228] 2008 (11) BCLR 1067 (CC) para 56.

[229] Section 7(1)(a) of Act 103 of 1977.

section 7(1)(b) of the Act.[230] Section 7(1)(b)(ii)(aa)[231] provides that the local authority cannot approve the building plans if it is satisfied that the building

> 'is to be erected in such manner or will be of such nature or appearance that – (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby; (bbb) it will probably or in fact be unsightly or objectionable and (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties'.

Furthermore, section 7(1)(b)(ii)(bb) provides that the local authority cannot approve the buildings if it is satisfied that the proposed building 'will probably or in fact be dangerous to life or property'. An applicant can have building plans set aside on review if he can prove that a building, built in accordance with validly approved building plans, has brought about one of the abovementioned grounds for review.

3 4 3 The setting aside of building plans on review

3 4 3 1 Interim interdict

It has become common practice for applicants to first apply for a prohibitory interdict prior to launching proceedings to have building plans set aside on review. The purpose of the temporary interdict is to prohibit the respondent from proceeding with building work, pending the application for the review and setting aside of building plans and the application for a demolition order.[232] The requirements for an interim interdict are a *prima facie* right; a well-grounded apprehension of irreparable harm; balance of convenience and absence of an alternative remedy.[233] This section briefly sets out

[230] *Muller and others v City of Cape Town and another* 2006 (5) SA 415 (C) para 28.

[231] Section 7(1)(b)(i) of Act 103 of 1977 provides that if the local authority may not approve building plans unless it is satisfied that the plans would comply with the provisions of the Building Standards Act or any other applicable law.

[232] See for example, *Searle v Mossel Bay Municipality and others* [2009] ZAWCHC 9 (12 February 2009) para 1, where the applicant sought an interdict, pending the first respondent's response to the applicant's request for reasons (in terms of section 5 of PAJA), for approving the second and third respondents' building plans. Furthermore, the interdict was sought pending any review proceedings that the applicant might have launched after having received the municipality's reasons.

[233] *Van der Westhuizen v Butler* 2009 (6) SA 174 (C) 181B-D.

some of the arguments raised in cases where applicants successfully obtained interdicts ordering the cessation of building works pending the outcome of review and demolition proceedings.

Land owners (who faced the possibility that their building plans could be set aside on review) have argued, with reference to *CoalCor (Cape) (Pty) Ltd and others, the Boiler Efficiency Services CC and others*,[234] that an interdict could only be granted if the building plans have already been set aside.[235] Therefore, the existence of the approved building plan prevented the applicant from establishing that the construction in accordance with such plans was unlawful.[236] In *Van der Westhuizen v Butler*,[237] the court explained that it had to decide whether it would rigidly enforce approved building plans that had not yet been set aside on review.[238] The rigid enforcement of the consequences of the valid decision would exclude the possibility of granting an interim interdict. However, in light of *Oudekraal Estates (Pty) Ltd v City of Cape Town* (*Oudekraal*),[239] the court rejected the respondent's argument that the decision to approve the building plans should be rigidly enforced. In *Oudekraal* the court determined that 'an unlawfully made administrative decision was nothing more than a relevant fact to be taken into account'.[240] The court held that 'the permission which had been initially granted and which will now be the subject matter of a review application cannot be an irresistible obstacle to the interim relief sought in this case'.[241] Accordingly, the existence of validly approved building plans can no longer automatically and finally prevent a neighbouring property owner from obtaining an interdict to temporarily stop building works.

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[234] 1990 (4) SA 394 (C).

[235] *Searle v Mossel Bay Municipality and others* [2009] ZAWCHC 9 (12 February 2009) para 5 and *Van der Westhuizen and others v Butler and others* 2009 (6) SA 174 (C) 182G-J.

[236] *Van der Westhuizen v Butler* 2009 (6) SA 174 (C) 181I-F.

[237] 2009 (6) SA 174 (C).

[238] 2009 (6) SA 174 (C) 184B-C.

[239] 2004 (6) SA 222 (SCA).

[240] 2009 (6) SA 174 (C) 182E-F.

[241] 2009 (6) SA 174 (C) 184D-E.

In *Searle v Mossel Bay Municipality and others* (*Searle*),[242] the court held that to show the existence of a *prima facie* right, the applicant had to prove the prospects of success in the pending review proceedings.[243] An interdict would only be granted if the applicant could prove that there were 'very weighty and convincing indications of the unlawfulness of the impugned decision' or that he was likely to suffer irreparable harm if the interim interdict was not granted.[244] One of the arguments raised by the applicant in *Searle* in support of his application for an interdict was that it would be more difficult to obtain a demolition order once a building had been completed.[245] As will be shown below, this argument was rejected by the court on the ground that the local authority has a statutory duty to enforce the provisions of the Building Standards Act. The court explained that the completed state of the unlawful structure might be an incentive for 'functionaries to go out of their way to determine regularization applications favourably and thereby permit a result that would not have been permitted if the factor of *fait accompli* had not been present'.[246] This potential could cause the applicant to get

[242] [2009] ZAWCHC 9 (12 February 2009).

[243] [2009] ZAWCHC 9 (12 February 2009) paras 6-10. This was the approach adopted in *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and others* 2001 (3) SA 344 (N) and *Transnet Bpk h/a Coach Express en n ander v Voorsitter en andere* 1995 (3) SA 844 (T). In this regard the court stated that it would not be prompted to grant the interim relief sought by the applicant simply because the applicant had requested reasons in terms of section 5 of PAJA. Another factor that would not influence the court to grant an interdict is the fact that the applicant's sea view had been obstructed. The court held with regard to the sea view that the harm had already been done and that this matter could only be adequately addressed by 'at least a partial demolition order'.

[244] [2009] ZAWCHC 9 (12 February 2009) paras 18-19, 20-25. The applicant in *Searle* succeeded in proving that he had a reasonable prospect of success to have the respondent's building plans set aside in review proceedings on account of safety concerns. Evidence was provided of the steep slope of the dune on which the respondent intended to build. There was a possibility that the physical integrity of the applicant's house would be compromised in the event that the dune was destabilised by the respondent's building operations. Apart from the safety concerns, evidence was also provided of alleged inconsistencies in the building plans and the conditions of approval. These inconsistencies further persuaded the court to find that the applicant stood a reasonable chance in having the plans set aside on review.

[245] [2009] ZAWCHC 9 (12 February 2009) para 10.

[246] [2009] ZAWCHC 9 (12 February 2009) para 11.

involved in additional review proceedings to compel the local authority to demolish the building.[247]

It appears that, once an applicant has succeeded in proving the existence of a *prima facie* right and the possibility of irreparable harm if the interdict is not granted, the courts would more easily find that the balance of convenience favours the applicant. In *Searle* the court held that 'the prejudice to the respondents that will be occasioned by a cessation of the building work must be subordinate to the applicant's entitlement to the enforcement of the principle of legality'.[248] The financial loss that a respondent would sustain due to the delay in the construction process is a factor that the court will take into account. The court will nonetheless have less sympathy if it appears that the respondent had proceeded with building even though he was aware of the pending review proceedings. This is illustrated in *Van der Westhuizen v Butler*,[249] where the respondents argued that they had already incurred R13,4 million in construction expenses and that they would 'suffer prejudice' if there was a delay in completing the building.[250] The court held that the respondents had continued to construct their building despite being aware of the pending review application and 'that in itself should weigh heavily with the courts in deciding whether to exercise its discretion and grant interim relief as sought'.[251] Accordingly, the balance of convenience did not favour the respondents and the court granted the interdict to restrain the respondents from continuing the building work pending the final determination of review proceedings and the demolition application.[252]

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[247] [2009] ZAWCHC 9 (12 February 2009) para 11. In this regard the court referred to *High Dune House v Ndlambe Municipality and others* [2007] ZAECHC 154 (29 June 2007) as a practical example of where the applicant had to engage in subsequent review proceedings to obtain the relief sought.

[248] [2009] ZAWCHC 9 (12 February 2009) para 26.

[249] 2009 (6) SA 174 (C).

[250] 2009 (6) SA 174 (C) 188G-I.

[251] 2009 (6) SA 174 (C) 189A-B.

[252] 2009 (6) SA 174 (C) 189D-F.

3 4 3 2 Grounds for review

3 4 3 2 1 Section 7(1)(a) of the Building Standards Act 103 of 1977

In terms of section 7(1)(a) of the Building Standards Act, a property owner can have building plans set aside if he shows that they do not comply with the provisions of the Act or any other applicable law. Applicants usually rely on the requirements set out in sections 5 and 6 of the Building Standards Act to prove that the respondent's building plans do not comply with the provisions of the Act as required in section 7(1)(a).[253]

One of the grounds relied upon in *Paola v Jeeva NO and others*,[254] in support of the application to have building plans set aside, was that the local authority had not appointed a building control officer as required in section 5 of the Act. Additionally, a building control officer had not made a recommendation to the local authority as required by section 6 of the Act. The court decided in favour of the applicant and held that it could not agree with the respondent's counsel that the failure to comply with the provisions of section 5 and section 7 of the Act amounted to a 'mere irregularity of no consequence'.[255] These sections were jurisdictional requirements and constituted 'necessary preconditions to the exercise by the local authority of its powers to approve or reject building plans'.[256] Similarly, in *Walele v The City of Cape Town and others*,[257] the applicant argued, in support of his application for review of the building plans, that the decision-maker had not received a recommendation from the building control officer as required by sections 6(1) and 7(1) of the Act. The court held that interpreting section 7(1) to mean that the decision-maker had only 'to infer from the recommendation that

[253] Section 5 of Act 103 of 1977 provides for the appointment of a building control officer. The functions of the building control officer are set out in section 6 of the Act. For example, section 6(1)(a) requires the building control officer to make recommendations to the local authority prior to the approval of building plans. Litigants have relied on the failure of the local authority to appoint a building control officer as a ground for setting building plans aside on the basis of section 7(1)(a) of the Act.

[254] 2004 (1) SA 396 (SCA). Refer to Van der Walt AJ *The law of neighbours* (2010) 364-366 for a discussion of this case.

[255] 2004 (1) SA 396 (SCA) para 13.

[256] 2004 (1) SA 396 (SCA) para 11.

[257] 2008 (11) BCLR 1067 (CC).

the disqualifying factors will not be triggered' would weaken the protection that the Act provided to neighbouring property owners.[258] Rather, it was the intention of the legislator that the decision-maker be 'himself' satisfied that 'the protection requirements were met'.[259] A court will have to conduct a factual enquiry to ascertain whether the decision-maker was 'satisfied' that the disqualifying factors would not be triggered.

The court held that the documents provided to the decision-maker could not have satisfied him that 'none of the disqualifying factors would be triggered' by the approval of the building plans.[260] Besides, even if the building control officer had considered the section 7(1)(b) factors, this was not communicated to the decision-maker.[261] The facts indicated that the building control officer was in possession of information that related to 'the very issues that the decision-maker had to consider'.[262] This information was not provided to the decision-maker and accordingly the court concluded that he could not have made an informed decision. The court therefore held that the mandatory requirements for the approval of building plans had not been complied with and as a result the building plans were set aside on review.

The exact scope of 'any other applicable law' remains unclear. In *Muller and others v City of Cape Town and another* (*Muller v the City of Cape Town*),[263] the court confirmed that 'any other applicable law' includes compliance with zoning scheme regulations.[264] This section draws on case law to determine what might constitute 'any other applicable law' for purposes of section 7(1)(a) of the Building Standards Act. Specifically, reference is made to *Muller v* the *City of Cape Town* as well as *Self en*

[258] 2008 (11) BCLR 1067 (CC) para 56.

[259] 2008 (11) BCLR 1067 (CC) para 56.

[260] 2008 (11) BCLR 1067 (CC) para 60.

[261] 2008 (11) BCLR 1067 (CC) para 66.

[262] 2008 (11) BCLR 1067 (CC) para 70.

[263] 2006 (5) SA 415 (C).

[264] The National Heritage Resources Act 25 of 1999 (the Heritage Resources Act) constitutes 'any other applicable law' for purposes of section 7(1)(a) of the Building Standards Act. This law is not discussed in this section since chapter 4 provides a detailed account of the limitations that the Heritage Resources Act imposes on ownership. Refer to chapter 4 for an explanation of the purpose of the Heritage Resources Act and the impact that it has on property owners' demolition rights.

andere v Munisipaliteit van Mosselbaai en 'n ander (*Self v Munisipaliteit van Mosselbaai*).[265] The applicants in the latter case successfully relied on the provisions of National Environmental Management Act 107 of 1998 (NEMA) to challenge the approval of building plans. Consideration will also be given to *Transnet Ltd v Proud Heritage Properties*[266] since this case serves as an example of where the applicants could have relied on the provisions of section 7(1)(a) in support of their review applications.

In *Muller v City of Cape Town*,[267] the applicants sought the review and setting aside of the first respondent's decision to approve the second respondent's building plans. In addition to the setting aside of the building plans, the applicants sought an order in terms of which the respondent's deviation plans would be set aside. Additionally, the applicants sought an order that would compel the second respondent to abide by zoning-scheme regulations in relation to height requirements.[268] The ground relied on by the applicants was that the first respondent had not applied his mind properly before approving the plans. Specifically, the applicants alleged that the structure exceeded the height limit in the zoning scheme regulations that were enacted in terms of the Land Use Planning Ordinance 15 of 1985 (LUPO). Furthermore, the alterations that had been carried out in line with the building plans interfered with the applicant's view from his property, which caused his property to derogate in value.[269]

The court held that zoning-scheme requirements constitute 'any other applicable law' as referred to in section 7(1)(a) of the Building Standards Act.[270] Therefore, before a local authority can approve building plans there has to be compliance with the provisions of the Building Standards Act as well as the zoning-scheme requirements.[271] Once the local authority is satisfied that the plans comply with both the Building

[265] [2006] 2 All SA 518 (C).

[266] [2008] ZAECHC 155 (5 September 2008).

[267] 2006 (5) SA 415 (C).

[268] 2006 (5) SA 415 (C) para 4.

[269] 2006 (5) SA 415 (C) para 5.

[270] 2006 (5) SA 415 (C) paras 28-29.

[271] 2006 (5) SA 415 (C) para 28.

Standards Act and the zoning-scheme requirements, it can proceed to consider section 7(1)(b)(ii) of the Act. The court held that it had to determine whether or not the second respondent's building plans complied with 'any other applicable law' as intended in section 7(1)(a) of the Act.[272]

It was also discovered that the incorrect method of calculation had been used to determine the height of the building. This was in contravention of the provisions of the zoning scheme and it was an indication that the official had not properly applied his mind when he approved the plans.[273] The court decided that the second respondent's house had resulted in the derogation in the value of the applicant's property, insofar as it did not comply with the height requirements imposed by the zoning scheme. This meant that the official responsible for approving the plan had not considered section 7(1)(b)(ii) of the Building Standards Act.[274] Accordingly, the court ordered that the building plans and the deviation plan be set aside. Furthermore, the court ordered the respondent to comply with the provisions of the zoning scheme regulations as set out in LUPO.

The applicants in *Self v Munisipaliteit van Mosselbaai*[275] sought the review and setting aside of the first respondent's decision to approve the second respondent's building plans. Furthermore, the applicants sought an order to compel the second respondent to demolish his building and to rehabilitate the area.[276] The applicants relied on ecological, aesthetic and safety grounds in support of their application for review of the building plans.[277] Most relevant to this discussion is the applicants' reliance on ecological grounds to have the building plans set aside.

[272] 2006 (5) SA 415 (C) para 29.

[273] 2006 (5) SA 415 (C) paras 58 and 63.

[274] 2006 (5) SA 415 (C) para 75.

[275] [2006] 2 All SA 518 (C).

[276] [2006] 2 All SA 518 (C) para 2.

[277] [2006] 2 All SA 518 (C) para 5.

It was argued that in contravention of the provisions of NEMA,[278] the first respondent failed to obtain an Environmental Impact Assessment prior to the approval of the building plans. An expert confirmed that the area was rich in conservation-worthy plant life and that irreversible damage would be caused by development on the respondent's site.[279] The second respondent argued that she was erecting a house that would cause the minimum interference with the natural environment and surrounds. In comparison with other houses built in the area, her house would only have a slight impact on the environment. Moreover, the entire area had been developed and the addition of another house would not have a significant impact on the environment.[280] The court rejected the arguments raised by the respondent and held that ecological considerations usually become more important in instances where a natural resource has been depleted by development.[281] The court held that the building plans had to be set aside due to the first respondent's failure to consider the provisions of NEMA.[282]

In *Transnet Ltd v Proud Heritage Properties*[283] the applicant applied for a permanent interdict prohibiting the respondent from continuing with the building of apartment blocks that would render the Richmond Beacon useless. The beacon is a navigational aid consisting of two leading lights that guide vessels through a 'dangerous or shallow channel' during night-time.[284] Even though this was not an application for review but for an interdict, the ground relied on by the applicant can arguably be applied within the context of section 7(1)(a) of the Building Standards Act. The applicant argued that it had a statutory duty to operate the beacon by virtue of the provisions of the National Ports Act 12 of 2005 (the Ports Act) and that the construction of the apartment

[278] The applicants alleged that the first respondent approved the building plans in contravention of sections 24(1), (3)(a) and (7) of Act 107 of 1998.

[279] [2006] 2 All SA 518 (C) para 11.

[280] [2006] 2 All SA 518 (C) para 20.

[281] [2006] 2 All SA 518 (C) para 21.

[282] [2006] 2 All SA 518 (C) para 24, with reference to Act 107 of 1998.

[283] [2008] ZAECHC 155 (5 September 2008). See the discussion of this case in Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 38.

[284] [2008] ZAECHC 155 (5 September 2008) para 3.

blocks prevented it from performing this duty as required by law.[285] The applicant further argued that the building plans should never have been approved, because the local authority did not consider the provisions of the Ports Act or the impact that the development would have on the beacon. [286]

The court decided in favour of the applicant. It held that the applicant did prove the existence of a clear right on the basis of its statutory duty. The applicant had also succeeded in showing that irreparable harm would follow if the respondents continued with the building operations. It was clear that the development would cause the beacon to become worthless and that the lights emanating from the apartment block would interfere with the efficiency of the entire system.[287] The respondents argued that the applicant had two other remedies available to it, namely that it could move the beacon or rely on the appeal procedure contained in section 9 of the Building Standards Act. The first remedy was rejected by the court on the ground that 'given the structure of the respondents' case and the submissions advanced to emphasise that the solution proposed by the respondents is not one countenanced in our law'.[288] As to the second remedy, the court held that the applicant did not contest the interpretation of any building regulation or related by-law. Therefore, the applicant could not have resorted to the section 9 appeal procedure.

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[285] [2008] ZAECHC 155 (5 September 2008) paras 1-2. Section 2(a) of Act 12 of 2005 explains that the object of the Act is to 'to promote the development of an effective and productive South African ports industry capable of contributing to the economic growth and development of the country'. Section 12(c) and 12(h) provides that the National Ports Authority (Pty) Ltd (the Authority) aims to achieve this objective by, amongst other things, enabling 'port users to access the port in the most effective way possible' and by promoting and undertaking 'the necessary measures to enhance safety and security of life and property in ports'. Section 74 of the Act stipulates that the Authority must 'for the purpose of ensuring safety of navigation and shipping in ports provide, operate and maintain adequate and efficient lighthouses and other navigational aids within the port limits and at such other places as the Authority may determine'.

[286] [2008] ZAECHC 155 (5 September 2008) para 18.

[287] [2008] ZAECHC 155 (5 September 2008) para 14.

[288] [2008] ZAECHC 155 (5 September 2008) paras 15-18.

Throughout this judgment, no reference was made to section 7(1)(a) of the Building Standards Act. However, one can argue that the applicant would have been successful in a review application had he relied on section 7(1)(a) to show that the local authority had failed to consider the impact of the provisions of the Ports Act in approving the respondent's building plans. Stated differently, the Ports Act can be interpreted as 'any other applicable law' for purposes of section 7(1)(a) of the Building Standards Act. This argument is supported by the fact that the beacon had stood at its current location for nearly thirty years and it was clear that building operations of the nature undertook by the respondents would have impacted negatively on the operation of the beacon.[289] One would expect a local authority to have detailed knowledge of the specific statutory enactments that could impact on building operations within its jurisdiction. Arguably, in this context, the local authority would not have been able to prove that it was 'satisfied' that the building operations would comply with the provisions of 'any other applicable law'.

The majority of the court in *True Motives 84 (Pty) Ltd v Madhi and another*[290] held that the correct interpretation of section 7(1)(a) was that the local authority must refuse the approval of the building plans if it is *satisfied* that it would not comply with the provisions of the Act or any other law. Furthermore, the local authority must refuse the approval of the plans if it is uncertain as to whether the plans will contravene the provisions of the Act or any other law.[291] The court held that 'the test imposed by section 7(1)(a) requires the local authority to be positively satisfied that the parameters of the test laid down are met'.[292] In light of this interpretation one can argue that the local authority in the *Transnet Ltd v Proud Heritage Properties*[293] would have been unable to conclude, without a doubt, that the building plans would not have violated any other applicable law.

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[289] [2008] ZAECHC 155 (5 September 2008) para 11.

[290] 2009 (4) SA 153 (SCA). See the discussion of this case in Van der Walt AJ 'Constitutional property law' (2009) 1 JQR 2.2.3 and Van der Walt AJ *The law of neighbours* (2010) 366-368.

[291] 2009 (4) SA 153 (SCA) para 19.

[292] 2009 (4) SA 153 (SCA) para 19.

[293] [2008] ZAECHC 155 (5 September 2008).

3 4 3 2 2 Section 7(1)(b)(ii)(aa) of the Building Standards Act 103 of 1977

As explained above, once the local authority is satisfied that building plans will comply with the provisions of section 7(1)(a) it can continue to consider the provisions of section 7(1)(b)(ii)(aa) of the Act. It is possible that building plans can, on the face of it, comply with section 7(1)(a) but 'nevertheless not be susceptible to approval'.[294]

Generally, applicants prefer to rely on section 7(1)(b)(ii)(aa)(ccc) because it is presumed, based on the findings in *Paola v Jeeva NO and others*,[295] that it is relatively simple to prove that a proposed building would derogate from the value of neighbouring properties and that it may therefore not be approved. As will be shown below, this presumption is incorrect in light of the recent decision in *True Motives 84 (Pty) Ltd v Madhi and another*,[296] where the court pronounced on the meaning of the word 'value' in the context of section 7(1)(b)(ii)(aa)(ccc) of the Building Standards Act. One can argue, with reference to the *True Motives*[297] decision, that it is possible for an applicant to have building plans set aside on review on the basis that the proposed building would derogate from the value of neighbouring properties, but the applicants will have to prove that a proposed building will devalue neighbouring properties more than is reasonable in the circumstances.

This section briefly discusses case law where the applicants were successful in relying on the provisions of section 7(1)(b)(ii)(aa) in support of their application to have building plans set aside. The section further examines the impact of *True Motives 84 (Pty) Ltd v Madhi and another*.[298] Mention should be made of the fact that in the cases where the applicants successfully relied on section 7(1)(b)(ii)(aa) to have building plans set aside, they had done so in conjunction with other grounds. It appears therefore that it is a rare occurrence for applicants to have building plans set aside on review solely on

[294] *True Motives 84 (Pty) Ltd v Madhi and another* 2009 (4) SA 153 (SCA) 162F-G.

[295] 2004 (1) SA 396 (SCA).

[296] 2009 (4) SA 153 (SCA).

[297] 2009 (4) SA 153 (SCA).

[298] 2009 (4) SA 153 (SCA).

the grounds of section 7(1)(b)(ii)(aa). Nevertheless, one should not exclude the possibility that the courts will delineate the scope of section 7(1)(b)(ii)(aa), which would enable applicants to extract the full potential of this provision to have building plans set aside on review.

In *Paola v Jeeva NO and others*,[299] the appellant appealed against the judgment of the court *a quo*, where his application for the review and setting aside of the third respondent's decision to approve building plans was dismissed. The first and second respondents were trustees of the trust that sought the approval of a building plan that would enable them to lawfully alter a structure on the trust property.[300] The applicant built his house about twenty years after the house on the trust property had been constructed. This house was designed, after considering the existing development on the trust property, to maximise the outlook and surroundings.[301] It was evident that the alterations in terms of the respondent's building plans would have significantly interfered with the views from the applicant's property.[302]

A local estate agent provided undisputed evidence that the market value of the applicant's house would diminish as a result of the developments on the trust property.[303] The applicant relied on three grounds in support of his application for the review of the building plans, the most important of which is that due to 'its size, proximity and position relative to his own house and its effect on his amenities the proposed development would probably or in fact derogate from the value of his property'.[304] Consequently, the applicant argued, the third respondent was precluded from approving

[299] 2004 (1) SA 396 (SCA).

[300] 2004 (1) SA 396 (SCA) para 1.

[301] 2004 (1) SA 396 (SCA) para 3.

[302] 2004 (1) SA 396 (SCA) para 3.

[303] 2004 (1) SA 396 (SCA) para 4.

[304] 2004 (1) SA 396 (SCA) para 5.

the plans on the grounds of section 7(1)(b)(ii)(aa)(ccc) of the Building Standards Act.[305] In this regard counsel for the applicant argued, with reference to section 7(1)(b)(ii)(aa)(ccc), that since undisputed evidence was provided of the potential derogation of value of the applicant's property as a result of the developments on the respondent's property, the building plans could not be approved. The applicant argued that the meaning of 'value' as intended in section 7(1)(b)(ii)(aa)(ccc) was a reference to market value.[306] In response, the respondents contended that the right to a view was not an aspect that the local authority had to take into account when deciding whether proposed development would derogate from the value of the neighbouring properties. Moreover, the applicant did not have a registered servitude that protected his right to a view.[307] The applicant argued that he did not assume that he had a right to a view. Rather, he sought the review and setting aside of the building plans on the grounds that statute prohibited the approval of plans in instances where it would derogate from the value of neighbouring properties.[308]

The court agreed that 'value' as intended in section 7(1)(b)(ii)(aa)(ccc) was a reference to market value.[309] Furthermore, the court held that a local authority cannot approve building plans once it is established that a proposed development would derogate from the value of a neighbouring property. Accordingly, the court concluded that there was sufficient indication that the value of the applicant's property would

[305] 2004 (1) SA 396 (SCA) paras 5-8 and 14. Other grounds relied on by the applicant were that the official 'did not apply his mind properly' in considering the plans and that the plans were in violation of town planning regulations 'because the rear space between the rear of the building and the rear boundary of the trust property was less than five metres'. The applicant also discovered, after the decision of the court *a quo* had been handed down, that a building control officer did not make a recommendation (as required in section 7(1)(a) of the Act) to the third respondent prior to the approval of the building plans. It was on the basis of this last ground that the court decided that the building plans should be set aside. It held that the recommendation from a building control officer was a jurisdictional fact and a prerequisite for the approval of the plans. The court proceeded to consider the other grounds, *obiter*, on the request of the parties.

[306] 2004 (1) SA 396 (SCA) para 19.

[307] 2004 (1) SA 396 (SCA) para 20.

[308] 2004 (1) SA 396 (SCA) para 19.

[309] 2004 (1) SA 396 (SCA) para 23.

diminish as a result of the development on the respondent's property.[310] The court held that the plans should not have been approved as the proposed building would derogate from the value of the applicant's property.[311] The plans were set aside on review, but on a different ground.[312]

The Constitutional Court in *Walele v The City of Cape Town and others* (*Walele*)[313] had to decide whether building plans submitted by the respondents, for the erection of a block of flats, had been approved in accordance with the provisions of the Building Standards Act. One of the grounds relied on by the applicant was that the flats would derogate from the value of his property.[314] The applicant's appeal was upheld by the majority of the court and consequently the respondent's building plans were set

[310] 2004 (1) SA 396 (SCA) para 23.

[311] 2004 (1) SA 396 (SCA) paras 16, 24-26.

[312] *Paola v Jeeva NO and others* 2004 (1) SA 396 (SCA) has been cited as authority in support of the argument that a property owner has a right to a view. More specifically, it has been argued on the basis of the court's interpretation of section 7(1) that in circumstances where development interferes with a property owner's view, that such a development will derogate from the value of the neighbouring property. Accordingly, the building plans should be set aside on the basis of section 7(1)(b)(ii)(aa)(ccc) of the National Building Regulations and Building Standards Act 103 of 1977. Van der Walt AJ *The law of neighbours* (2010) 356-376 explains, with reference to the common law principles, that the right to a view was not recognised in Roman-Dutch or in English law. There is possibly one exception, namely that the right to natural light may have been recognised in Roman law. Van der Walt argues in light of the common law principles that it would be strange to allow the recognition of a right to a view via legislation that regulates building and development. Recently, in *Erasmus NO and another v Blom and others* [2011] ZAECPEHC 11 (31 March 2011) paras 36-37 the court explained that there is general agreement that the entitlements that accompany the ownership of land do not include the right to a view. A property owner can only obtain a right to a view by way of a negative servitude; restrictive condition; building legislation or the provisions of a town-planning scheme. A property owner would have to rely on section 7(1)(a) of the Building Standards Act to challenge the approval of building plans, in the circumstance where those plans are approved despite the existence of one of these mechanisms designed to protect his view.

[313] 2008 (11) BCLR 1067 (CC).

[314] 2008 (11) BCLR 1067 (CC) para 2.

aside.[315] Most relevant to this discussion is the majority of the court's interpretation of section 7(1)(b)(ii) of the Act.

Jafta AJ explained that the Building Standards Act bars property owners from erecting buildings for which they had not obtained approved building plans. The Building Standards Act therefore limits the property owner's rights with regard to the use of his property.[316] The approval of the building plans itself does not affect the rights of other neighbouring property owners. However, the subsequent execution of the plans can result in the construction of a building that does affect neighbouring property owners. It is for that reason that the provisions of the Building Standards Act must be read in line with section 39(2) of the Constitution.[317] Additionally, sections 6 and 7 of the Building Standards Act have to be interpreted within the context of the Act as a whole and these two sections have to be read together.[318] Accordingly, the court held that the decision-maker had to be satisfied of two things prior to approving the building plans, namely that

[315] 2008 (11) BCLR 1067 (CC) para 72. The applicant also argued that the decision-maker did not have a recommendation before him when he had to approve the building plans. This constituted a violation of sections 6 and 7 of the Building Standards Act. The court decided in favour of the applicant as the city had not complied with the mandatory requirements of the Building Standards Act.

[316] 2008 (11) BCLR 1067 (CC) para 52.

[317] 2008 (11) BCLR 1067 (CC) para 52. Section 3 4 2 above explains that neighbouring land owners do not have the right to be heard prior to the approval of a neighbour's building plans. The reason for this is that section 7 of the Building Standards Act contains a list of ground in terms of which building plans can be set aside on review. This is understandable if one considers the fact that it is not the approval of plans that affect neighbouring landowners' rights, but the subsequent construction of an potentially illegal building.

[318] 2008 (11) BCLR 1067 (CC) para 54. The court explained that section 7 comprises of four issues that relate to 'the process of exercising the power to approve building plans'. Firstly, in terms of section 6 the building control officer has to make a recommendation to the local authority with regard to the building plans. Secondly, the local authority must approve the building plans if it is satisfied that the plans comply with the provisions of the Building Standards Act and with the provisions of any other law, unless it is also satisfied that the building, built in accordance with the proposed plans, 'will trigger one of the disqualifying factors in section 7(1)(b)(ii)'. Thirdly, the local authority must refuse to approve the plans if it is satisfied that one of the disqualifying factors will be brought about by the proposed building. Finally, the decision-maker should refuse the application for the approval of the building plans if he is of the opinion that the plans do not comply with the necessary requirements.

the plans complied with 'necessary legal requirements' and that the section 7(1)(b)(ii) requirements were not triggered by a building built in accordance with the approved plans.[319] With reference to the decision in *Paola v Jeeva NO and others*,[320] the court stated that building plans had to be set aside on review if for example it authorised the construction of a building that devalued neighbouring properties. Furthermore, the applicant could challenge the approval of the plans 'irrespective of whether or not the decision-maker was satisfied that none of the disqualifying factors could be triggered'.[321] To have the building plans set aside, an applicant will simply have to prove that the 'erection of the building will reduce the value of his or her property'.[322]

The court held that 'the legislature could not have intended to authorize an invalid exercise of power'.[323] This consequence could be avoided if the decision-maker approved a building plan only once he was satisfied that the disqualifying factors would not be triggered by the construction of a building pursuant to such a plan. The court held that this interpretation of the Act was consistent with the 'obligation to promote the spirit, purport and objects of the Bills of Rights'.[324] This interpretation further shows that it is not only the interests of the individual land owner that deserve protection, but also the interests of neighbouring property owners that may be adversely affected by a building erected in terms of approved building plans, in circumstances where the approval process did not afford them a hearing.[325] The court held that this interpretation strikes a balance between the rights of the land owner to 'exercise his or her right of ownership over property' and the rights of neighbouring land owners.[326]

[319] 2008 (11) BCLR 1067 (CC) para 55.

[320] 2004 (1) SA 396 (SCA).

[321] 2008 (11) BCLR 1067 (CC) para 55.

[322] 2008 (11) BCLR 1067 (CC) para 55.

[323] 2008 (11) BCLR 1067 (CC) para 55.

[324] 2008 (11) BCLR 1067 (CC) para 55.

[325] 2008 (11) BCLR 1067 (CC) para 55.

[326] 2008 (11) BCLR 1067 (CC) para 55.

True Motives 84 (Pty) Ltd v Madhi and another[327] challenged the Constitutional court's interpretation of section 7(1)(b)(ii) as set out in *Walele v The City of Cape Town and others*.[328] In this decision, the Supreme Court of Appeal held that the correct interpretation of section 7(1)(b)(ii) is that the local authority must refuse the approval of the building plans if it is *satisfied* that 'the building will probably or in fact cause one of the undesirable outcomes'.[329] The court explained that section 7(1)(b)(ii) did not enable the local authority to refuse the approval of the plans simply because there was a possibility that one of the section 7(1)(b)(ii) grounds would be triggered.[330] Rather, the local authority could only refuse the approval if such an outcome was *probable*.[331]

The court held that *Paola v Jeeva NO and others* (*Paola*)[332] is not authority for the view that a building plan was invalid if the building caused derogation of the value of a property. Further, *Paola* did not support the view that 'the court's own determination of the issue as to whether a building will derogate from the value justifies the setting aside of a local authority's approval of a plan'.[333] Finally, *Paola* was not authority for the proposition that the local authority must 'be satisfied that none of the undesirable outcomes set out in section 7(1)(b)(ii) will be a consequence of the erection of the building concerned'.[334]

The Constitutional Court summarised the differences between these two interpretations of section 7(1)(b)(ii) of the Building Standards Act, without deciding upon the correctness of either one, in *Camps Bay Ratepayers and Residents Association and*

[327] 2009 (4) SA 153 (SCA).

[328] 2008 (11) BCLR 1067 (CC).

[329] 2009 (4) SA 153 (SCA) para 21.

[330] 2009 (4) SA 153 (SCA) para 21.

[331] 2009 (4) SA 153 (SCA) para 21.

[332] 2004 (1) SA 396 (SCA).

[333] 2009 (4) SA 153 (SCA) para 29.

[334] 2009 (4) SA 153 (SCA) para 29.

another v Harrison and another.[335] In this case the court explained that the interpretation adopted in *Walele* means that the local authority cannot approve building plans unless it is 'positively satisfied' that one of the disqualifying factors in section 7(1)(b)(ii) will not be triggered.[336] This implies that the applicant (who applies for the approval of plans) must show that the disqualifying factors will not be triggered. Additionally, *Walele* imposes a positive duty on the local authority to ensure that the disqualifying factors are not triggered. By contrast, the interpretation adopted by *True Motives 84 (Pty) Ltd v Madhi and another* means that the local authority must approve the building plans unless it is satisfied that the 'proposed building will probably, or in fact, trigger one of the disqualifying factors' in section 7(1)(b)(ii).[337] This interpretation requires of the objector to show the existence of one of the disqualifying factors. The court did not indicate which was the correct interpretation of section 7(1)(b)(ii).

Another factor that the court in *True Motives 84 (Pty) Ltd v Madhi and another*[338] had to consider was the meaning that had to be attributed to the phrase 'derogation of value'.[339] The court held that 'value' had to be interpreted as 'market value'.[340] Market value is 'the price that an informed willing buyer would pay to an informed willing seller for the property, having regard to all its potential at the time of sale, both realised and unrealised'.[341] The implication is that the informed buyer and seller will always take into account all advantages as well as disadvantages that will flow from the 'lawful exercise of rights' and these considerations will be reflected in the price attributed to the

[335] 2011 (2) BCLR 121 (CC). This case was an application for leave to appeal against the Supreme Court of Appeal's findings in *Camps Bay Ratepayers and Residents Association v Harrison* [2010] ZASCA 3 (17 February 2010). One of the grounds on which the court refused leave to appeal was that the applicants case did not raise issues pertaining to the interpretation of section 7(1)(b)(ii). Moreover, because the issue was not raised the court refused to indicate whether *Walele v City of Cape Town* or *True Motives 84 (Pty) Ltd v Madhi and another* formulated the correct interpretation for section 7(1)(b)(ii).

[336] 2011 (2) BCLR 121 (CC) para 33.

[337] 2011 (2) BCLR 121 (CC) para 33.

[338] 2009 (4) SA 153 (SCA).

[339] 2009 (4) SA 153 (SCA) para 30.

[340] 2009 (4) SA 153 (SCA) para 30.

[341] 2009 (4) SA 153 (SCA) para 30.

property.[342] Essentially, a hypothetical willing buyer and seller would take into account the possibility and effect of later legal building developments on adjacent plots of land when determining the market value of the plot which is for sale. Furthermore, to determine the market value of the property the local authority must take into account all 'adverse aspects' flowing from the lawful use of the property that will be contemplated by a willing buyer and seller.[343] Derogation of value only takes place if the 'influence of such aspects exceeds the contemplation of the hypothetical informed parties'.[344] The local authority must assess the facts of each individual case. Further, the building control officer possesses the relevant expertise to make a finding after it has considered all 'facts and probabilities'.[345] The building control officer would be able to determine whether an unforeseen disadvantage would be brought about by the construction of the proposed building.[346]

The Supreme Court of Appeal criticised the *Walele*[347] judgment insofar as it incorrectly interpreted and applied the findings in *Paola v Jeeva NO and others*.[348] Furthermore, the majority was of the opinion that the statements made in *Walele* were based on 'wrong statements of the law' and 'obiter'.[349] The court held that *Walele*

[342] 2009 (4) SA 153 (SCA) para 30.

[343] 2009 (4) SA 153 (SCA) para 30.

[344] 2009 (4) SA 153 (SCA) para 30. This interpretation of 'value' was confirmed by the Constitutional Court in *Camps Bay Ratepayers and Residents Association and another v Harrison and another* 2011 (2) BCLR 121 (CC) paras 38-40. The court elaborated that a 'hypothetical buyer' of property would give consideration to the limitations that will be placed on his land-use rights by legislation such as zoning scheme regulations. A building that interferes with the 'previously existing attributes of the subject property' will not necessarily derogate the value of the neighbouring property. However, there will be derogation in the value of surrounding properties if a building does not comply with the law. Accordingly, derogation in market value will arise if a building does not comply with statutory provisions or, if it does comply with legislation, it is 'so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale'.

[345] 2009 (4) SA 153 (SCA) para 31.

[346] 2009 (4) SA 153 (SCA) para 31.

[347] 2008 (11) BCLR 1067 (CC).

[348] 2004 (1) SA 396 (SCA).

[349] 2009 (4) SA 153 (SCA) para 35.

created the incorrect impression that a neighbouring property owner could appeal against the decision to approve the building plan if he can show that the proposed building will derogate the value of his property. The court explained that 'the existence of such a right is in conflict with the appeal procedure laid down in section 9 of the Act and ignores the nature of the local authorities decision under section 7(1)(b)(ii) and the test which that body is required to apply'.[350]

As explained above, the decision of *Paola v Jeeva NO and others*[351] has been relied on to support the notion that a property owner simply has to prove that a proposed building will cause his property to devaluate to have the building plans set aside. The court in of *True Motives 84 (Pty) Ltd v Madhi and another*[352] attempted to resolve to some extent the uncertainties created by decisions such as *Walele* with regard to the correct interpretation of section 7(1)(b)(ii) of the Act. Currently, in light of *True Motives 84 (Pty) Ltd v Madhi and another*, it appears that property owners will only be able to successfully rely on the provisions of section 7(1)(b)(ii)*(aa)(ccc*) if they could prove that their properties would derogate beyond what could reasonable be anticipated by a willing buyer and a willing seller. This would be difficult to prove, especially if one considers the emphasis placed on the expertise and duties of the building control officer in the approval process as a whole. An applicant would have a greater chance at success if he, in addition to relying on one of the section 7(1)(b)(ii) grounds, relies on other grounds in support of his application for review and setting aside on the building plans. For example, the applicant can rely on administrative law grounds to impugn the recommendation made by the building control officer to the local authority. Alternatively, the applicant can rely on section 7(1) of the Building Standards Act in support of his argument that the local authority, prior to approving building plans, had not given proper consideration to the recommendation placed before it.

[350] 2009 (4) SA 153 (SCA) para 36.

[351] 2004 (1) SA 396 (SCA).

[352] 2009 (4) SA 153 (SCA).

3 4 4 Application for a demolition order once building plans have been set aside

3 4 4 1 High Dune House (Pty) Ltd v Ndlambe Municipality and others[353]

Recently, the courts confirmed the role of the demolition order as an instrument to protect the rights of neighbouring property owners. In so doing, the court emphasised the responsibilities of local authorities with regard to buildings built in contravention of the provisions of the Building Standards Act.[354]

The court in *High Dune House (Pty) Ltd v Ndlambe Municipality and others* (*High Dune House v Ndlambe Municipality*) reviewed and set aside the approval of the respondent's building plans. The implication was that the respondent had constructed a building for which there were no approved building plans. In such instances the Building Standards Act prescribes that a local authority has a duty to 'take appropriate steps to ensure that the position is regularised'.[355] The respondent relied on section 8 of PAJA to launch a counter-application for a declaratory order that his house should not be demolished and that he should pay R600 000 to compensate the applicant.[356] The respondent argued that the payment of compensation could adequately address the

[353] [2007] ZAECHC 154 (29 June 2007).

[354] Act 103 of 1977.

[355] [2007] ZAECHC 154 (29 June 2007) para 2.

[356] [2007] ZAECHC 154 (29 June 2007) para 2. Section 8(1)(d) stipulates that a court that has heard an application under section 6 can make an 'order declaring the rights in respect of any matter to which the administrative action relates'. Section 8(1)(c)(ii)(bb) enables the court, in exceptional circumstances, to order a party to review proceedings to pay of compensation.

harm suffered by the applicant and submitted that the payment of compensation was preferable to demolition or partial demolition.[357]

The court held that it would not prematurely grant a declaratory order that would 'directly impinge upon or confine the discretion of the local authority in carrying out any of the duties imposed on it by law'.[358] It explained that the local authority was faced with a house that was built in contravention of section 4 of the Building Standards Act. One of the measures that an authority can take is a demolition order as prescribed in section 21 of the Act. The court held that 'the local authority should have at its disposal all possible options for solving what is likely to continue to be a difficult problem'.[359]

There was a possibility that the respondent would not be able to provide the local authority with building plans (for the existing structure) 'which are capable of approval'.[360] In such instances the only option available to the local authority was the demolition of the non-complaint structure.[361] Accordingly, the court held that:

> '[a]n application to court to determine the question of demolition or partial demolition is inappropriate and premature until the local authority has dealt with the matter, all

[357] [2007] ZAECHC 154 (29 June 2007) para 3. The reasons provided by the respondent in support of his application was that the cost of demolition, wasted expenses brought about by demolition and the cost of building a new house outweighed the amount of fair compensation. Furthermore, the abovementioned costs were 'out of proportion both to the reduction in the value of the applicant's property, and to the extent of any amenity loss caused by obstructing the applicant's view'. The respondent also argued that there was a risk that the process of demolition could destabilise the dune on which the second respondent's house was situated. This could have potentially negative consequences for the houses on adjoining properties. Finally, the second respondent had laboured under a *bona fide* belief that he was building his house in accordance with a validly approved building plan. The respondent explained that he was the victim 'of mistakes by the professional persons who advised him and built his house, and mistakes by the local authority in the process of approving the plans'.

[358] [2007] ZAECHC 154 (29 June 2007) para 5.

[359] [2007] ZAECHC 154 (29 June 2007) para 5.

[360] [2007] ZAECHC 154 (29 June 2007) para 5.

[361] [2007] ZAECHC 154 (29 June 2007) para 5.

> the alternatives have been presented and considered, and demolition or partial demolition is indeed an issue'.[362]

3 4 4 2 Searle v Mossel Bay Municipality and others[363]

The court in *Searle v Mossel Bay Municipality and others*[364] explained that local authorities have a statutory duty to enforce compliance with zoning schemes.[365] Furthermore, the Building Regulations Act enables local authorities to demolish 'non-compliant' buildings, namely buildings for which there are no approved building plans as required by section 4 of the Building Standards Act.

The court held that the local authority would be compelled to consider the possibility of demolition or partial demolition in instances where building plans are set aside on review, and where the 'resultant position cannot be lawfully remedied'.[366] If a local authority unreasonably fails to demolish a building under such circumstances, that decision will 'itself be reviewable at the applicant's instance in terms of section 6(3) read with section 8 of PAJA'.[367] The court stated that the question of demolition cannot be decided 'whimsically or capriciously, whether by the relevant functionaries or, indeed, a court'.[368] Furthermore, 'the primacy in our constitutional order of the principle of legality makes it unlikely that the building owner's convenience will prevail if the structure is in fact irremediably unlawful'.[369] The court held that 'pre-constitutional judgments such as *De Villiers v Kalson*[370] must, insofar as their references to the court's discretion where

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[362] [2007] ZAECHC 154 (29 June 2007) para 5.

[363] [2009] ZAWCHC 9 (12 February 2009).

[364] See the discussion of this decision in Van der Walt AJ 'Constitutional property law' (2009) 1 *JQR* 2.2.2.

[365] [2009] ZAWCHC 9 (12 February 2009) para 10.

[366] [2009] ZAWCHC 9 (12 February 2009) para 10. In this regard the court referred to *High Dune House (Pty) Ltd v Ndlambe Municipality and others* [2007] ZAECHC 154 (29 June 2007) and *Van Rensburg NNO v Nelson Mandela Metropolitan Municipality* 2008 (2) SA 8 (SE).

[367] [2009] ZAWCHC 9 (12 February 2009) para 10.

[368] [2009] ZAWCHC 9 (12 February 2009) para 10.

[369] [2009] ZAWCHC 9 (12 February 2009) para 10.

[370] 1928 EDL 217 at 231.

the demolition of buildings is in issue, be construed and applied in the light of modern constitutional principle'.[371]

3 4 4 3 Conclusion

Essentially, these two decisions confirm that buildings become unlawful and susceptible to demolition once building plans are set aside on review. A local authority has a duty to regularise the building in an attempt to prevent the demolition of the entire building. Stated differently, the local authority must determine what can be done to render the building compliant with the provisions of the Act. This might entail the partial demolition of certain sections of the building to bring it in line with the requirements set in legislation. The local authority has a statutory duty to demolish the building if it is satisfied that nothing can be done to regularise the building. However, the demolition of an entire building should only occur in exceptional circumstances. A neighbouring property owner can, on the authority of the *Searle* case, approach the court for an order that compels the local authority to demolish or partially demolish a building if it has failed to do so in accordance with the provisions of the Building Standards Act. Due to the onerous nature of a demolition order it seems fair that the local authority should first attempt to find alternatives to the demolition of buildings. Such an alternative would be the partial demolition of those sections that cannot be regularised. A building should be demolished in its entirety in circumstances where all alternatives have been exhausted and where the building cannot be brought in line with the provisions of the Building Standards Act.

3 5 The *Oudekraal* principle

3 5 1 Oudekraal Estates (Pty) Ltd v City of Cape Town and others[372]

It has been confirmed above that neighbouring property owners can apply to the local authority for demolition orders once building plans have been set aside on review.

[371] [2009] ZAWCHC 9 (12 February 2009) para 10.

[372] 2004 (6) SA 222 (SCA).

Nevertheless, it is possible for a court to refuse to set aside building plans, by virtue of the *Oudekraal* principle, even though the applicant had established a clear right to such relief. The implication is that in such circumstances the applicant could be denied the right to apply for the demolition of unlawful building works.

In *Oudekraal* the court confirmed that in proceedings for judicial review, a court has the discretion to set aside unlawful administrative action. In this regard the court stated:

> '[i]t is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide'.[373]

Specifically, the court referred to delay in launching review proceedings as a factor that would potentially influence the court's discretion.[374] When exercising its discretion, a court will take into account the length of time that has lapsed since the administrative action has first taken place. In addition to the lapse of time the court will also consider all relevant circumstances, including 'the need for finality', 'the consequences for the public at large, and, indeed for future generations, of allowing the invalid decision to stand'.[375] Furthermore, the court will also consider the extent to which parties might have acted in reliance upon the delay.[376]

3 5 2 Practical application of the *Oudekraal* principle

This principle was applied in *Camps Bay Ratepayers and Resident's Association v Harrison*.[377] The parties in this case were involved in litigation since 2005 and a few

[373] 2004 (6) SA 222 (SCA) 246D.

[374] 2004 (6) SA 222 (SCA) 242E. In this regard the court referred to *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) 318C, where the court explained that in instances where a court refused to set aside an unlawful decision on account of delay it could be said that 'in a sense delay would validate a nullity'.

[375] 2004 (6) SA 222 (SCA) 249H-I.

[376] 2004 (6) SA 222 (SCA) 249I.

[377] [2010] ZASCA 3 (17 February 2010). For a discussion of this decision, refer to Van der Walt AJ 'Constitutional property law' (2010) 1 *JQR* 2.1.1.

orders were handed down throughout the battle. The appellants appealed against the refusal of the court *a quo* to review and set aside the decision of the second respondent to approve the first respondents building plans.[378] One of the grounds relied on by the applicants in the court *a quo* were the breach of zoning scheme requirements and the contravention of conditions of title. The appellants further questioned the procedural fairness of the decision to approve the first respondent's building plans.[379] Subsequently, the appellants added additional grounds, namely that the building plan contravened a provision in the zoning scheme and that 'the approval of the plans as a rider to a previously approved plan was incompetent'.[380] The court *a quo* refused to consider these grounds 'on the basis that it had been raised late (in reply) and was as a result not adequately canvassed'.[381] In the Supreme Court of Appeal the appellants relied on the same grounds as those relied on in the court *a quo*. They also raised additional grounds which are not relevant to this discussion.

The Supreme Court of Appeal rejected all but one of the grounds raised by the appellant. It held that the court *a quo* had wrongly refused to entertain the ground raised by the appellant in relation to the zoning scheme and it determined that the provision had been contravened in so far as the respondents building encroached over the building line.[382] Accordingly, the court had to determine whether the appellants were entitled to have the building plans set aside on that ground. The court explained that the litigation process had been going on for three years before the appellants raised this specific ground, which created the impression that the 'infraction was not their primary concern'.[383]

The *Oudekraal*[384] delay principle was a further reason why the court refused to entertain this ground. Furthermore, the court explained that even since before PAJA the

[378] [2010] ZASCA 3 (17 February 2010) para 1.

[379] [2010] ZASCA 3 (17 February 2010) para 13.

[380] [2010] ZASCA 3 (17 February 2010) para 13.

[381] [2010] ZASCA 3 (17 February 2010) para 14.

[382] [2010] ZASCA 3 (17 February 2010) para 45.

[383] [2010] ZASCA 3 (17 February 2010) para 55.

[384] *Oudekraal Estates (Pty) Ltd v The City if Cape Town and others* 2004 (6) SA 222 (SCA).

courts have recognised the principle that it might refuse to grant relief on account of delay to bring the action.[385] With reference to *Oudekraal*,[386] the court held that it could not condone the delay and that the application for the review and setting aside of the building plans had to be denied. The reasons provided were that the three year delay was significant, 'particularly if regard is had to the promptitude with which people might ordinarily be expected to act and build in accordance with approved building plans'.[387] It could not be said that the respondent acted with intent when she built over the building line. She acted in accordance with the approved building plans and it would be costly to adapt the building. In addition to the costs of adapting the building she had incurred 'considerable cost in defending litigation that was quite unrelated to the encroachment over the building line'.[388] The encroachment was moreover so insignificant that it had gone unnoticed for three years. Finally, the local authority was of the view that there was no 'prospect that the infraction will impact in any meaningful way on the aesthetics or future development of Camps Bay'.[389]

The *Oudekraal* principle, as illustrated in *Camps Bay Ratepayers and Resident's Association v Harrison*,[390] has clear implications for neighbouring property owners seeking to have building plans set aside on review and the subsequent demolition of building works. It is evident that the court has the discretion to refuse the granting of a demolition order, even in instances where the applicant has shown that he has a right to such relief. This is to be welcomed in light of the fact that exceptional circumstances can arise where, despite the fact that the building cannot be regulated, the granting of a demolition order would be disproportionate to the harm suffered by neighbours. In

[385] [2010] ZASCA 3 (17 February 2010) para 57. In support of this statement the court referred to the decisions, amongst others, of *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) and *Wolgroeiers Afslaers v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) 42A-D.

[386] 2004 (6) SA 222 (SCA).

[387] [2010] ZASCA 3 (17 February 2010) para 62.

[388] [2010] ZASCA 3 (17 February 2010) para 62.

[389] [2010] ZASCA 3 (17 February 2010) para 62. In *Camps Bay Ratepayers and Residents Association and another v Harrison and another* 2011 (2) BCLR 121 (CC) the court refused the applicants leave to appeal against the judgment of the Supreme Court of Appeal.

[390] [2010] ZASCA 3 (17 February 2010).

exercising its discretion the court will take a range of factors into account, including the delay of the applicant in bringing the proceedings; the potential hardship suffered by the respondent and the seriousness of the respondent's contravention of the Building Standards Act. The court can also consider factors such as the impact of the invalid administrative action on the public and third parties.

In conclusion, the principle of legality requires of the courts and local authorities to act strictly in accordance of the law, raising the real possibility that buildings might have to be demolished because the buildings plans were set aside on review. However, the *Oudekraal* discretion affords the court sufficient flexibility to cater for those exceptional cases where the granting of a demolition order seems excessive.

3 6 Conclusion

This chapter consisted of four main parts, on restrictive conditions, illegal buildings and building works, buildings that were built in accordance with building plans set aside on review and, finally, instances where the courts might not order the demolition of an illegal structure. Throughout the chapter the emphasis fell on firstly, the local authorities' statutory duties in relation to illegal and unlawful buildings and, secondly, the right of land owners to approach the court for relief in instances where a neighbour developed his land in a manner proscribed by law. Local authorities are ultimately responsible to regulate building and development in their area of jurisdiction, and to ensure the congruent and healthy development of urban areas. This means that where necessary local authorities must apply to have illegal and unlawful structures partially or wholly demolished. Restrictive conditions such as conditions of title are invaluable town-planning tools specifically designed to protect the unique character of built-up areas. However, these tools can only be effective if they are properly enforced by local authorities. A demolition order is a particularly effective enforcement mechanism as it removes the unlawful use of land and restores the character of the neighbourhood. Likewise, case law has confirmed that local authorities should demolish illegal structures in instances where they cannot be brought in line with the law. This means that when building plans are set aside on review the local authority must first determine

whether the building can be altered or adapted so that it meets the relevant statutory requirements. Local authorities must apply for a demolition order when it is discovered that the illegal structure cannot be remedied. The courts have in this regard explained that the 'primacy in our constitutional order of the principle of legality makes it unlikely that the building owner's convenience will prevail if the structure is in fact irremediably unlawful'.[391] Furthermore, decisions such as *Barnett* show that there are instances where the court will order the summary demolition of illegal structures. Typically, this will occur when persons build structures in blatant disregard of the law. In such instances the courts have explained that it will not protect the interests of those persons who cynically disregarded the law. As in the case of restrictive conditions demolition is the most efficient way in which the local authority can remove the illegal use of land and uphold the interests that are protected by building and development laws.

As stated above, the chapter emphasised that neighbouring land owners have the right to apply to the courts for demolition orders in instances where their neighbours constructed illegal or unlawful buildings. Restrictive conditions constitute limited real rights and it has been confirmed that they amount to constitutional property.[392] The chapter showed the willingness of the courts to order the demolition of buildings built in conflict with such restrictive conditions. In so doing, the courts protected the limited real rights held by neighbouring land owners. Case law has also confirmed that neighbouring land owners (and voluntary associations acting on behalf of land owners) can approach the courts for relief (often in the form of an interdict and later a demolition order) in instances where neighbours construct illegal building works, or where buildings are rendered illegal because building plans have been set aside on review. One can conclude that it is desirable for neighbouring land owners to become more actively involved in regulating building and development in their area. Neighbouring land owners know their environment better and will, as such, be more attuned to the construction of illegal and unlawful buildings in their area.

[391] *Searle v Mossel Bay Municipality and others* [2009] ZAWCHC 9 (12 February 2009) para 10.

[392] *Ex Parte Optimal Property Solutions CC* 2003 (2) SA 136 (C).

Finally, *Camps Bay Ratepayers and Resident's Association v Harrison* (*Camps Bay*)[393] made it explicit that there are exceptional instances where the courts would be unwilling to order the demolition of a building, even though it is in principle illegal. It is impossible to delineate all the factors that can cause a court to shy away from a demolition order. The *Camps Bay* decision indicated that the court will consider the number of years that the illegal structure (or illegal aspects of the structure) had gone unnoticed; whether the illegality of the structure poses a threat to the public whether it will negatively impact on the area where the building is situated; whether the structure infringes on the rights of others; the degree of illegality and the cost of altering or demolishing the structure. Essentially, whether or not the court would order the demolition of the structure will depend on the unique circumstances of the case.

[393] [2010] ZASCA 3 (17 February 2010). For a discussion of this decision, refer to Van der Walt AJ 'Constitutional property law' (2010) 1 JQR 2.1.1.

Chapter 4:
The impact of historic preservation laws on property owners' demolition rights

4 1 Introduction

The desire to preserve historic and culturally significant buildings is a worldwide phenomenon. Generally, this goal is achieved through the enactment of legislation designed to protect historically or culturally valuable buildings held in private ownership. Although legislation of this nature addresses the broader social need for heritage preservation, it can deprive an individual owner of some of his ownership entitlements, including demolition rights. This usually becomes an issue when the owner intends to demolish a historic property for purposes of development; where the building's maintenance becomes too expensive or when the building is so dilapidated that it presents a danger to life or property. In such instances, historic preservation legislation may compel an owner to apply for a permit to demolish the building, either as a whole or partially. These applications are often unsuccessful.

In addition to the deprivation of their demolition rights, preservation laws can compel property owners to maintain the protected building at their own expense. The maintenance of historic buildings can place an immense financial burden on the owner. Furthermore, once a building is formally protected, the owner might often only be able to do very little on his property without first obtaining the consent of the heritage authorities. It is therefore evident that historic preservation laws can drastically interfere with ownership entitlements.

The purpose of this chapter is to establish the nature of the limitations that historic preservation laws place on owners' rights to demolish culturally valuable buildings. This chapter will specifically refer to heritage preservation jurisprudence from three jurisdictions, namely South Africa, the United States of America (the US) and Germany. The two foreign legal systems were selected as they both operate within constitutional frameworks that are comparable to the South African situation. In both jurisdictions the

courts have handed down landmark judgments concerning the limitations that can be placed on ownership by historic preservation laws. In *Penn Central Transportation Company v City of New York*,[1] the US Supreme Court confirmed the constitutional validity of historic preservation laws. A similar conclusion was reached by the German Federal Constitutional Court in *Rheinland-Pfälzischen Denkmalschutz-und-Pflegegesetz*.[2] However, in the German case it was also decided that historic preservation laws can, in some instances, place too severe limitations on ownership entitlements. In certain exceptional circumstances, a property owner cannot be expected to bear the burden of maintaining a historic building in the public interest. Accordingly, there are circumstances where the owner should be allowed to demolish a protected building. Alternatively, the land owner should be compensated for the loss suffered as a result of his inability to demolish, develop or use the property.

To date, the South African Constitutional Court has not been confronted with a dispute concerning the constitutionality of the limitations imposed by the National Heritage Resources Act 25 of 1999 (the Heritage Resources Act) on ownership. As a result, it is still unclear as to when these limitations will be excessive and unconstitutional. The discussion of the two foreign legal systems assists in delineating the circumstances where it might be unconstitutional to deny the owner a demolition permit for a protected building. This discussion further highlights the distinguishing factors that might render otherwise excessive limitations on ownership constitutional.

The first section of this chapter provides a brief overview of historic preservation in the South African context. This overview includes a reference to the statutory predecessors of the Heritage Resources Act and an explanation of the operation of the Act. The focus of the second section falls on a discussion of South African case law, where the courts have interpreted the scope of the heritage authorities' statutory powers in relation to historic buildings. This is followed by a discussion of US case law and the prominent German decision in *Rheinland-Pfälzischen Denkmalschutz-und-*

[1] 438 US 104 (1978).

[2] *BVerfGE* 100, 226 [1999].

Pflegegesetz.[3] The final section considers the broader implications of US and German law as applied to South African law.

4 2 An overview of historic preservation in South Africa

Pienaar explains that the statutory protection of monuments and buildings in South Africa developed in four phases.[4] Initially, during the first phase, there was no legislation that protected historic buildings and monuments.[5] It was only later, during the second phase, with the promulgation of the Natural and Historical Monuments, Relics and Antiquities Act 4 of 1934 (the 1934 Monuments Act), that historic buildings and monuments were successfully protected by statute.[6] The National Monuments Act 28 of 1969 (the 1969 Monuments Act), the predecessor of the National Heritage Resources Act 25 of 1999 (Heritage Resources Act), marked the third phase of the statutory protection of buildings and other monuments. The fourth phase includes important amendments to the 1969 Monuments Act, introduced by the War Graves and National

[3] *BVerfGE* 100, 226 [1999].

[4] Pienaar JM 'Bewaring en die Wet op Nasionale Gedenkwaardighede 28 van 1969' (1996) 29 *De Jure* 89-111 at 90. These phases were the pre-1936 phase; the 1936 to 1969 phase; the 1969 to 1986 phase and the post-1986 phase.

[5] Pienaar JM 'Bewaring en die Wet op Nasionale Gedenkwaardighede 28 van 1969' (1996) 29 *De Jure* 89-111 at 90. The first statutory provisions, vaguely related to the protection of monuments, were found in the Bushman-Relics Protection Act 22 of 1911 (the Bushman-Relics Act). This Act was created for two purposes, namely to prevent the removal of Bushman relics to Europe, and further to cultivate a sense of appreciation for South African heritage.

[6] Pienaar JM 'Bewaring en die Wet op Nasionale Gedenkwaardighede 28 van 1969' (1996) 29 *De Jure* 89-111 at 90. A previous act, the Natural and Historical Monuments Act 6 of 1923 (the 1923 Monuments Act), was enacted to preserve monuments and historic buildings. Unfortunately, the provisions of this Act were not productively employed to protect culturally valuable buildings. This could be ascribed to the lack of funds and the inability of the council to designate buildings for protection. The Bushman-Relics Act, and the 1923 Monuments Act, was later consolidated into the 1934 Monuments Act. Pienaar explains that the 1934 Monuments Act, in contrast to the 1923 Monuments Act, provided the commission with more power to control the demolition and damaging of valuable buildings.

Monuments Amendment Act 11 of 1986 (the 1986 War Graves and Monuments Act).[7] A fifth phase was initiated by the promulgation of the Heritage Resources Act, which operates within the framework of the Constitution of the Republic of South Africa, 1996 (the Constitution).[8]

The Heritage Resources Act prohibits the demolition of buildings that are either protected by the formal, or the general protections of the Act. The greater part of the discussion below is centred on section 34, a general protection provision, which prohibits the demolition of any building older than 60 years without a permit. Section 34 should be understood within the broader scheme of the Act. Accordingly, in the following paragraphs reference is made to the manner in which heritage resources are identified, managed and protected. These paragraphs also mention the system of heritage resource management prescribed by the Heritage Resources Act and the heritage assessment criteria that are taken into account when determining whether a building should form part of the national estate. Finally, the section provides a brief account of some of the formal protection measures that are put in place to protect historically and culturally valuable buildings.

The Heritage Resources Act consists of three chapters, namely Chapter I: the system for the management of national heritage resources;[9] Chapter II: the protection

[7] Pienaar JM 'Bewaring en die Wet op Nasionale Gedenkwaardighede 28 van 1969' (1996) 29 *De Jure* 89-111 at 91. One of the important amendments was that under the 1986 Act, numerous buildings of scientific, historic and aesthetic value could be protected as one preservation area (*bewaringsgebied*). Previously, under the 1969 Monuments Act, it was only possible to designate and protect single monuments and not an entire area.

[8] The 1969 Monuments Act was repealed by section 60 of the National Heritage Resources Act 25 of 1999 (the Heritage Resources Act).

[9] Chapter I. This chapter is divided into two parts, namely Part 1, which contains general principles concerning, amongst other things, the national estate, the application of the Act and general principles for resource management. Part 2 contains provisions relating to the constitution, functions, powers and duties of heritage resources authorities.

and management of heritage resources;[10] and Chapter III: general provisions.[11] Section 4 stipulates that Chapter 1 of the Act 'establishes the national system for the management of heritage resources'.[12] This chapter serves as a guideline for the management of heritage resources in South Africa.[13] It also provides the framework in terms of which a heritage resource authority should perform its functions and exercise its powers.[14] Chapter I establishes the South African National Heritage Resource Agency (SAHRA)[15] as the statutory body responsible for managing the national estate. Section 4(1)(d) provides for the establishment of provincial heritage resources agencies (PHRAs). The PHRAs are responsible for the management of heritage resources on a provincial and local level.[16] Section 4(1)(d) should be read with section 8, which provides for the creation of a three-tiered heritage resources management system. This system consists of heritage resources authorities on the national, provincial[17] and local levels. Each of these spheres of heritage resource authorities is responsible for identifying and managing different levels of heritage resources. The national heritage resource authority is responsible for identifying and managing Grade I heritage resources and the provincial and local heritage resource authorities are responsible for

[10] Chapter II. The formal protections created by the Act are set out in Part 1. Part 2 consists of provisions regarding the general protection of heritage resources. The provisions concerning the management of heritage resources are set out in Part 3. Section 34, a general protection provision, places an express limitation on property owners' demolition rights. This section is discussed in more detail below.

[11] Chapter III. This chapter has two parts. In Part 1, the provisions relating to enforcement, appeals, offences and penalties are set out. Part 2 contains miscellaneous provisions.

[12] Section 4(1) of Act 25 of 1999.

[13] Section 4(1)(b) of Act 25 of 1999.

[14] Section 4(1)(c) of Act 25 of 1999.

[15] The SAHRA is established in terms of section 11, and its powers are set out in section 13 of the Act. The SAHRA is a body corporate that can sue, and be sued, in its corporate name.

[16] Section 4(1)(d) of Act 25 of 1999.

[17] Section 23 of Act 25 of 1999 stipulates that an MEC may establish a provincial heritage authority that shall be responsible for managing heritage resources in a specific province. The provincial heritage authority is a body corporate that can sue, and be sued, in its corporate name. The functions, powers and duties of provincial heritage resources authorities are set out in section 24 of the Act.

identifying and managing Grade II and Grade III heritage resources. The SAHRA collectively organises the three levels of heritage resource agencies.[18]

Section 7 stipulates that the SAHRA should, in consultation with the minister and MEC for each province, develop a grading system for cultural places and objects that will form part of the national estate.[19] The SAHRA must also prescribe heritage assessment criteria that are consistent with the criteria set out in section 3(3) of the Act. These criteria are used by heritage resources authorities to 'assess the intrinsic, comparative and contextual significance of a heritage resource and the relative benefits and costs of its protection'.[20] The section 3(3) criteria for determining whether a building or an object should form part of the national estate can roughly be separated into three groups, namely buildings and objects that are relevant to a specific community or cultural group;[21] buildings and objects that possess unique aesthetic, architectural,

[18] Heritage authorities must recognise and promote the general principles of heritage management that are set out in section 5 of Act 25 of 1999. For example, section 5(1)(a) provides that '[h]eritage resources have lasting value in their own right and provide evidence of the origins of South African society, and as they are valuable, finite, non-renewable and irreplaceable they must be carefully managed to ensure their survival'. Section 5(1)(b) stipulates that 'every generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans'.

[19] Section 3(1) of Act 25 of 1999 provides that '[f]or the purposes of this Act, those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations must be considered part of the national estate and fall within the sphere of operations of heritage resources authorities'. Section 3(2) provides a list of what can form part of the national estate.

[20] Section 7(1)(c) of Act 25 of 1999.

[21] Section 3(3)(a) stipulates that a building or an object will form part of the national estate because of 'its importance in the community, or pattern of South Africa's history'. In a similar vein, section 3(3)(e) provides that a building or object will form part of the national estate because of 'its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group'. Finally, section 3(3)(g) provides that a building or object will form part of the national estate because of 'its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons'.

technical or other qualities;[22] and finally buildings and objects that are historically relevant.[23] These three categories reveal that buildings can be protected for purposes other than pure aesthetic or historic value. In the South African context, heritage preservation has become a method of giving recognition to those cultures and histories that were previously neglected. One can argue that it is in the public interest to safeguard buildings from destruction because of the fundamental value that a specific community may attach to them.

Heritage resources are protected under the formal protections or the general protections listed in the Act. As explained above, these protections place a limitation on property owners' right to demolish protected buildings on their property. For example, section 27, a formal protection measure, authorises the declaration of national and provincial heritage sites.[24] It is the duty of the SAHRA and the PHRAs to protect national and provincial heritage sites 'in accordance with the provisions of this section'.[25] A property owner is prohibited from demolishing, damaging, defacing,

[22] In terms of section 3(3)(b) and (d), buildings or objects will form part of the national estate because they either possess 'uncommon, rare or endangered aspects of South Africa's natural or cultural heritage', or because they demonstrate 'the principal characteristics of a particular class of South Africa's natural or cultural places or objects'. Finally, in terms of section 3(3)(f), buildings or objects will form part of the national estate if they demonstrate 'a high degree of creative or technical achievement at a particular period'.

[23] In terms of sections 3(3)(c),(h) and (i), buildings or objects will form part of the national estate if they 'aid understanding of an aspect of South Africa's natural or cultural heritage'; if they have a 'strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa' and if they are 'sites of significance relating to the history of slavery in South Africa'.

[24] In terms of section 27(1) of Act 25 of 1999, the SAHRA can declare a national heritage site if it considers a place to be 'so exceptional' that it meets the heritage assessment criteria that are 'set out in section 3(2) and prescribed under section 6(1) and (2)' of the Act. Similarly, section 27(2) of the Act enables the provincial heritage authority to declare a provincial heritage site if a place is significant within the 'context of the province or a region in terms of the heritage assessment criteria set out in section 3(2) and prescribed under section 6(1) and (2)' of the Act.

[25] Section 27(15) and (16) of Act 25 of 1999.

excavating, altering,[26] removing from its original position, subdividing or changing the planning status of any national or a provincial heritage site without a permit.[27] Similarly, section 29 authorises the provisional protection of a property for a maximum period of two years.[28] Limitations identical to those listed in section 27(18) can be imposed on an owner once the building has been placed under provisional protection.[29] A compulsory restoration order can be imposed on a property owner in instances where he destroyed, altered or developed, without a permit, any building that is listed on the heritage register or that is situated within a heritage area.[30]

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[26] 'Alter' is defined in section 2(i) of Act 25 of 1999 as 'any action affecting the structure, appearance or physical properties of a place or object, whether by way of structural or other works, by painting, plastering or other decoration or any other means'.

[27] Section 27(18) of Act 25 of 1999. Section 27(19)(a) and (b) stipulates that a heritage authority may issue regulations concerning the protection of sites under its control or any other site, provided that it has obtained the consent of the owner of the sites. These regulations can protect heritage sites from 'destruction, damage, disfigurement, excavation or alteration'. It can also regulate 'the conditions of use of any heritage site or the conditions for any development thereof'.

[28] Section 29(1) of Act 25 of 1999 authorises the heritage authority to provisionally protect 'any protected area'; 'a heritage resource, the conservation of which it considers to be threatened and which threat it believes can be alleviated by negotiation and consultation' and, 'a heritage resource, the protection of which SAHRA or the provincial heritage resources authority wishes to investigate in terms of this Act'.

[29] These limitations are listed in section 29(10) of Act 25 of 1999. Similar limitations are placed on ownership by sections 28, 30 and 31 of the Act. Section 28 enables the heritage resource authority to declare land surrounding a national heritage site or a shipwreck, as well as land upon which a mine dump is situated, a protected area provided it has obtained the owner's consent. Section 28(3) stipulates that a person may not 'damage, disfigure, alter, subdivide or in any other way develop any part of a protected area unless, at least 60 days prior to the initiation of such changes, he or she has consulted the heritage resources authority which designated such area in accordance with a procedure prescribed by that authority'. Section 30 requires the provincial authority to compile and maintain a heritage register where it lists all the heritage resources that it considers conservation worthy in the province. In terms of section 31 a heritage authority can declare any site of cultural or historic interest a heritage area. Section 30(11)(a) and section 31(7)(a) stipulate that the special consent of the local authority is required for 'any alteration to or development' that will affect a place listed on the heritage register or any site that has been declared a heritage area.

[30] Sections 30(11)(e) and 31(7)(c) of Act 25 of 1999.

In a recent decision, *SA Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and another*,[31] the court had to determine whether a section 29 protection order precluded the property owner from continuing with building works despite the fact that he was in possession of approved building plans and that the first phase of construction was completed.[32] The court held that vested rights are not created upon the approval of building plans as required by sections 4 and 7 of the National Building Standards and Building Regulations Act 103 of 1977. Therefore, it is possible for the heritage authority to place a building under provisional protection even in instances where the owner had obtained valid building plans for development on the property. The court explained that, within the context of the Constitution, property owners are expected to tolerate inroads into their ownership entitlements. Such an inroad is created by the provisions of the Heritage Resources Act.[33]

The Heritage Resources Act does include some measures that are designed to alleviate the burden that are placed on property owners. One such a measure is section 40 support programmes, in terms of which the SAHRA can provide financial assistance in the form of the grant or a loan 'to an approved body or an individual for any project

[31] 2007 (2) SA 461 (C).

[32] 2007 (2) SA 461 (C) paras 4-8. The second respondent operated the Arniston Hotel on property owned by the first respondent and it was their intention to expand and develop the property in two phases. Building plans for both phases had been approved in accordance with the provisions of the National Building Regulations and Building Standards Act 103 of 1977. The respondents proceeded with the second phase of the development despite the fact that the property was provisionally protected under section 29 of the Heritage Resources Act. They adopted the stance that the decision to extend the area of provisional protection was unlawful, and that the proclamation did not operate retroactively to prevent building works for which building plans had already been approved.

[33] 2007 (2) SA 461 (C) para 16. The respondents relied on three additional grounds in support of their argument that the provisional protection notice was invalid. Firstly, they challenged the procedural fairness of the decision to place the hotel under provisional protection. Secondly, they contested the scope of the protection order. Finally, the respondents challenged the duration of the protection order.

which contributes to the purpose' of the Act.[34] Section 42 of the Heritage Resources Act makes provision for the conclusion of heritage agreements. In terms of section 42(1) the SAHRA or a PHRA can, with the consent of the owner, conclude a heritage resources agreement with a provincial authority, local authority, conservation body, person or community that will provide for the improvement, or the presentation of a clearly defined heritage resource.[35] In terms of this agreement the owner of a national heritage site, a provincial heritage site or a place listed in a heritage register, may appoint the heritage resources authority or the local authority as the guardian of the place.[36] The heritage agreement may further provide for the 'maintenance and the management of the place',[37] or 'the payment of any expenses incurred by the owner or the guardian in connection with the maintenance of the place'.[38] Section 46, the expropriation provision, states that the minister may, 'on the advice of SAHRA and after consultation with the Minister of Finance' expropriate any property for preservation, provided that it is for a public purpose and in the public interest.[39] Finally, the section 49 appeal provides that any person who wishes to launch an appeal against the decision of the SAHRA or a PHRA must, within 30 days of the decision being handed down, give written notice to the minister or the MEC, who will appoint an 'independent tribunal, consisting of three experts, having expertise regarding the matter'.[40] The tribunal must have due regard to '(a) the cultural significance of the heritage resources in question'; '(b) heritage conservation principles', and '(c) any other relevant factor which is brought to its attention by the appellant or the heritage resources authority'.[41]

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[34] Section 40(1) of Act 25 of 1999. In terms of section 40(2) SAHRA must 'prescribe the procedures for the applications for the approval and granting of financial assistance and the criteria for the assessment of projects'. Section 40(4) stipulates that financial assistance granted in terms of section 40 must be paid from the National Heritage Resources Fund.

[35] Section 42(1)(a) of Act 25 of 1999.

[36] Section 42(8) of Act 25 of 1999.

[37] Section 42(9)(a) of Act 25 of 1999.

[38] Section 42(9)(h) of Act 25 of 1999.

[39] Section 46(1) of Act 25 of 1999.

[40] Section 49(2) of Act 25 of 1999.

[41] Section 49(3)(a)-(c) of Act 25 of 1999.

In conclusion, it is clear that the formal preservation protections in the Heritage Resources Act place extensive limitations on ownership. One such limitation is the prohibition against demolition of buildings that are protected by one of the formal protections measures listed in the Act. Another is the positive burdens that may be imposed on owners of protected properties, for example in the form of restoration orders. The Heritage Resources Act does contain some measures that are designed to alleviate the burden placed on the owners of heritage resources. However, it is unclear when an owner will qualify for financial or another form of assistance from the heritage authorities. The section below considers the implications that section 34, a general protection provision, has for a property owner's demolition rights.

4 3 The limitation imposed on property owner's demolition rights by section 34 of the Heritage Resources Act

4 3 1 Section 34 of the Heritage Resources Act

Section 34 of the National Heritage Resources Act 25 of 1999 (the Heritage Resources Act) places an express limitation on the demolition rights of property owners. This section has far-reaching consequences as it applies to any building that is older than sixty years. Section 34(1) provides:

> '[n]o person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority'.

In terms of section 34(2) the provincial heritage authority should, within three months of refusing the demolition permit, proceed to consider protecting the structure under one of the formal protections of the Act.[42]

[42] Section 34(3) provides that the provincial resources authority has the discretion to, by way of a notice placed in the Provincial Gazette, create an 'exemption from the requirements of subsection (1) within a defined geographical area, or for certain defined categories of site within a defined geographical area, provided that it is satisfied that heritage resources falling into the defined area or category have been identified and are adequately provided for in terms of the provisions of Part 1 of this Chapter'.

The correct interpretation of section 34(1) and (2), as well as the scope of its application, have been scrutinised by the courts. Case law has also addressed the question of whether neighbouring property owners have the standing to prevent the demolition of a structure in accordance with a section 34(1) permit. The discussion below addresses two issues, namely *locus standi* and cases where the heritage authorities' section 34 powers have been challenged. In the first section the rules pertaining to *locus standi* are described to determine who has standing to enforce compliance with the Heritage Resources Act. This section also considers whether neighbouring property owners have the right to prevent the demolition of a historic building in their area. Section two discusses case law where the correct interpretation and application of section 34 have been considered. The purpose of this discussion is to delineate the legal position of property owners who wish to demolish buildings that are protected by sections 34(1) and (2) of the Act. This discussion is followed by a summary of the collective effect of these provisions as interpreted by the courts.

4 3 2 Locus standi

In *Raubenheimer NO v Trustees, Hendrik Johannes Bredenkamp Trust and others*,[43] the court had to determine whether the applicant, a resident of a seafront neighbourhood and the chairperson of the local residents' association, had *locus standi* to interdict the demolition of a building for which a section 34(1) permit had been issued. This case illustrates the uncertainty concerning neighbouring land owners' standing to prevent the demolition of a house in accordance with a section 34(1) demolition permit. This section determines whether neighbouring land owners have standing to enforce the provisions of the Heritage Resources Act. More specifically, this section determines whether neighbouring land owners have standing to prevent the demolition of a structure for which a section 34(1) permit has been issued. This section briefly outlines the legal rules in relation to standing to determine whether neighbouring land owners have the right to enforce the provisions of the Heritage Resources Act. The section also considers the impact of the *Raubenheimer* decision on the *locus standi* issue.

[43] 2006 (1) SA 124 (C).

A neighbouring land owner would typically enforce compliance with legislation, such as the Heritage Resources Act, by either obtaining a prohibitive or mandatory interdict. In some instances, it would also be necessary to have a decision taken in terms of the Heritage Resources Act set aside on review. Cilliers, Loots and Nel explain that a person will have the standing to obtain an interdict for breach of legislation provided that he meets the requirements set out in *Patz v Green.*[44] This decision confirmed that any person has standing to enforce compliance with legislation, provided he can show that he is adversely affected by the non-compliance with the Act.[45] Alternatively, if legislation was enacted to benefit a specific group or class of persons, any person of such a group will have *locus standi* to enforce compliance with the legislation even if he has not suffered harm.[46] However, the courts have in a series of cases confirmed that land owners in a township, including voluntary associations acting on behalf of land owners, have standing to enforce compliance with building and development laws such as the National Building Standards and Building Regulations Act 103 of 1977 (the Building Standards Act) or the provincial ordinances.[47] Arguably, as in the case of the Building Standards Act, neighbouring land owners will have the *locus standi* to enforce compliance with the provisions of the Heritage Resources Act. This right not only extends to neighbouring land owners, but also to other land owners in the township, and to heritage preservation associations acting on behalf of the owners

[44] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume I 5 ed (2009) 192 with reference to *Patz v Green* 1907 TS 427 at 433

[45] *Patz v Green* 1907 TS 427 at 433.

[46] 1907 TS 427 at 433. It is doubtful whether the National Heritage Resources Act 25 of 1999 (the Heritage Resources Act) was enacted for the benefit of a specific group or class of persons. Accordingly, potential litigants will have standing if they can show that they have been adversely affected by non-compliance with the legislation.

[47] Van der Walt AJ *The law of neighbours* (2010) 348 with reference to *Erf 167 Orchards CC v Greater Johannesburg Metropolitan Council Johannesburg Administration and another* 1999 CLR 91 (W); *PS Booksellers (Pty) Ltd and another v Harrison and others* 2008 (3) SA 633 (C) para 19; *Chairperson, Walmer Estates Residents Community Forum and another v City of Cape Town and others* 2009 (2) SA 175 (C) and *Tergniet and Toekoms Action Group and 34 others v Outeniqua Kreosootpale (Pty) Ltd and others* [2009] ZAWCHC 6 (23 January 2009) para 22.

in the area. Moreover, section 6(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides that 'any person may institute proceedings in a court or tribunal for the judicial review of administrative action'.[48] Finally, section 38(c) of the Constitution states that 'anyone acting as a member of, or in the interest of, a group or class of persons' may approach a court in circumstances where a right in the Bill of Rights have been infringed. The implication is that neighbouring land owners, including voluntary associations acting on behalf of land owners, will have the *locus standi* to have a decision taken in terms of the Heritage Resources Act, set aside on review, provided that they have first exhausted internal remedies.[49] Neighbouring land owners will therefore first have to launch an appeal in terms of section 49 of the Heritage Resources Act before they can have a heritage authority's decision set aside on review. One can conclude in light of these considerations that neighbouring land owners will have the standing to request a prohibitory interdict to prevent the destruction of the building, if a heritage authority has issued a demolition permit for an historic structure, despite an irregularity in the approval process. The heritage preservation authority's decision can then be set aside on appeal or, alternatively, during the review proceedings.

As explained above, the *Raubenheimer* case created uncertainty as to whether neighbouring property owners have standing to prevent the demolition of a treasured building situated in their area. After this decision it is also unclear whether neighbouring property owners would have the right to launch a section 49 appeal against the heritage authority's decision to issue a section 34(1) demolition permit. The applicant in *Raubenheimer* sought an interim interdict to prevent the demolition of an historic house, pending the outcome of section 49 appeal proceedings, which he intended to launch.[50] More specifically, the applicant intended to challenge the heritage authority's decision to allow the demolition of the house. The applicant argued that he did have *locus standi* to

[48] Section 6(1) of the Promotion of Administrative Justice Act 3 of 2000.

[49] Section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 provides that 'no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

[50] 2006 (1) SA 124 (C) para 1.

seek an interdict because the house formed part of his 'social and cultural life' and he received 'emotional and psychological satisfaction' from it.[51] The court explained that it first had to determine whether the applicant would have the right to launch a section 49 appeal. It would then consider the standing of the applicant to obtain an interdict. Section 49(2) read with regulation 12(1) of the Heritage Resources Act provides that any '[p]ersons and bodies with a bona fide interest in, or who are affected by a decision of a committee or other delegated representative of the South African Heritage Resources Agency may appeal to the SAHRA Council against such decision'.[52] The court found that the applicant did not have a *bona fide* interest in the granting of the demolition permit. Furthermore, the applicant was not affected by the decision to demolish the house. His attachment to the structure was purely sentimental and emotional, and his attempt to represent the house as a historical beacon was based on 'vague, romantic and incorrect or exaggerated statements'.[53] Accordingly, the applicant did not have the standing to launch a section 49 appeal. Likewise, the applicant did not have the standing to interdict the demolition of the structure pending the outcome of the section 49 appeal. Even if the applicant did have the requisite *locus standi* he would not have met the requirements for an interim interdict.[54]

Two comments can be made in relation to this decision. Firstly, it seems that the court collapsed the merits of the case into the question whether the applicant had a right to launch a section 49 appeal. The fact that the house was in a state of disrepair, and that it no longer resembled the original cottage to which the community was attached, should not have been a relevant consideration in determining whether the applicant had a right to launch appeal proceedings. Arguably, the merits of the case should be considered during the appeal proceedings. Furthermore, regulation 12(1) provides that

[51] 2006 (1) SA 124 (C) para 28.

[52] 2006 (1) SA 124 (C) para 45 with reference to section 12(1) of the regulations to the National Heritage Resources Act 25 of 1999 published in Provincial Notice, Western Cape 336 of 2002 (*Government Gazette* 5937 25 October 2002). This appeal must be launched within fourteen days from the date on which the applicant was notified, in writing, that the permit has been issued.

[53] 2006 (1) SA 124 (C) para 46.

[54] 2006 (1) SA 124 (C) para 52.

any person has standing if he has a *bona fide* interest in, or is affected by, the decision of the heritage authority. This means that a person does not necessarily have to be directly affected by the demolition of an historic structure to launch an appeal. One can argue that property owners in a neighbourhood have a *bona fide* interest in the demolition of historic structures that are situated in their residential area. Neighbouring property owners should, by implication, have the right to launch a section 49 appeal against the decision of the heritage authority to allow the demolition of a building.

Secondly, the considerations outlined above indicate that neighbouring land owners, including voluntary associations acting on behalf of land owners, have standing to approach the court for an interdict to prevent the demolition of a building pending the outcome of appeal or review proceedings. The requirements for a temporary and final interdict are well-known. To obtain an interim interdict an applicant will have to show that he has a clear or *prima facie* right; that there is a well grounded apprehension of irreparable harm if the relief is not granted and that the balance of convenience favours the granting of relief.[55] In the case of a permanent interdict an applicant will have to show that on a balance of probabilities he has a clear right to relief; that there is an injury actually committed or reasonable apprehended and, finally, that there is no alternative remedy available.[56] One can argue that on the one hand, a neighbouring land owner will satisfy the requirements for either an interim or final interdict if there was an indication that the heritage authority, or even a land owner, had acted in conflict with the provisions of the Heritage Resources Act. On the other hand, neighbouring land owners might not meet the requirements for an interdict if all the provisions of the Heritage Resources Act had been complied with, but where they nevertheless assert that the heritage authority's decision to issue a demolition permit is wrong. The reason for this is twofold. Firstly, the principle of deference requires of the courts to respect 'the findings of fact and policy decisions made by those with special expertise and

[55] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume II 5 ed (2009) 1456-1457.

[56] Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume II 5 ed (2009) 1456.

experience in the field.'[57] Secondly, the right of a land owner to apply for review and setting aside of the heritage authority's decision to grant a demolition permit is comparable to the right of a land owner who applies to have his neighbour's building plans set aside on review. The Constitutional Court confirmed that neighbouring land owners do not have the right to participate in the decision-making process when building plans are submitted for approval.[58] The reason for this is that the National Building Standards and Building Regulations Act 103 of 1977 (the Building Standards Act) contains provisions that are designed to protect neighbouring land owners' rights. Moreover, section 7 of the National Building Standards and Building Regulations Act 103 of 1977 contains a list of grounds in terms of which the decision to approve building plans can be challenged.[59] Like the Building Standards Act, the Heritage Resources Act incorporates provisions designed to protect the public interest in historically and culturally valuable buildings. A neighbouring land owner's rights are adequately protected provided that all the relevant statutory provisions have been followed.

4 3 3 Cases where the heritage authorities' section 34 powers had been challenged

4 3 3 1 The Qualidental Laboratories cases 2007/2008

In *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another*,[60] the Cape Provincial Division of the High Court, and eventually the Supreme Court of Appeal, had to determine whether it was permissible for the heritage authority to impose conditions that would safeguard another building on the property, which was not formally protected under the Act, when granting a section 34(1) demolition permit. The owner of a historic property applied to the first respondent, the PHRA, for a demolition permit that would

[57] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) para 22.

[58] *Walele v The City of Cape Town* 2008 (11) BCLR 1067 (CC) para 45.

[59] *Walele v The City of Cape Town* 2008 (11) BCLR 1067 (CC) para 45.

[60] 2007 (4) SA 26 (C); 2008 (3) SA 160 (SCA). Refer to Van der Walt AJ 'Constitutional property law' (2007) 3 *JQR* 2.2 and Van der Walt AJ 'Constitutional property law' (2008) 2 *JQR* 2.1.3 for a discussion of these decisions. See also Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 36-37.

enable him to demolish two buildings (both older than 60 years as specified by section 34(1) of the Act), referred to as the villa and the annex.[61] This application was deemed incomplete due to a lack of information and the applicant was directed to obtain a heritage statement from a heritage practitioner.[62] The heritage practitioner stressed the aesthetic and cultural importance of the villa.[63] Consequently, the first respondent granted a demolition permit for the annex, subject to certain conditions imposed in terms of section 48(2) of the Heritage Resources Act.[64] These conditions stipulated that a permit was granted for the demolition of the annex, but not for the villa; any new development on the property had to be approved by the committee; and any new development had to be secondary to the villa in relation to massing, siting, scale and location.[65] Reasons provided in support of the conditional permit were, firstly, that the villa was worthy of protection and, secondly, that any development that detracted from the villa's landmark status was inconsistent with the first respondent's statutory duty to protect culturally and historically valuable buildings.[66]

The applicant did submit building plans to the first respondent in accordance with the conditions imposed on it. It was evident that the applicant intended to build two apartment blocks on the property. These plans were rejected by the first respondent on the grounds that one of the apartment blocks would obstruct the main view of the villa from a specific street and that the new development would be intrusive, and would not suit the context created by the villa as well as other buildings in the vicinity.[67] The first

[61] 2007 (4) SA 26 (C) 27.

[62] 2007 (4) SA 26 (C) 27-28.

[63] 2007 (4) SA 26 (C) 28. At this stage the court explained that the villa was not protected under any of the formal protections created by the Act. The court pointed out that the villa did fall within an area that had been designated by the municipality's consultants as 'being worthy of consideration of an erven conservation area in terms of the local zoning scheme'.

[64] Section 48(2) enables heritage authorities, upon the application by a property owner for a permit, to exercise their discretion to issue a conditional permit. Section 48(2)(a)-(d) provides a non-exhaustive list of conditions than can be imposed by the heritage authorities.

[65] 2007 (4) SA 26 (C) 28-29.

[66] 2007 (4) SA 26 (C) 29.

[67] 2007 (4) SA 26 (C) 29.

respondent was of the view that the new development would make a 'mockery of the villa's landmark status'.[68]

The applicant proceeded with the development despite the fact that the building plans were not approved by the first respondent or by a local authority as required by the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act).[69] A stop works order was issued by the first respondent, but was ignored by the applicant, who considered it invalid.[70] Consequently, the applicant launched an application for the review of the first respondent's decision to issue a conditional demolition permit.[71] In response, the first respondent launched a counter-application for an interdict prohibiting the applicant from acting contrary to the conditional demolition permit and the stop works order.[72] Counsel for the applicant argued that the first respondent had acted beyond the powers conferred on it by the Act when it imposed the conditions. Alternatively, counsel argued that the conditions were invalid as they had been imposed for a purpose which was not authorised by the Act.[73] Finally, the stop works order was invalid as it was issued on the basis of invalid conditions.[74] Counsel explained that the first respondent could only exercise its powers to regulate future developments on a property, if that property was protected by one of the formal protections of the Act. Consequently, the only powers on which the first respondent could rely in support of its actions were the powers created in terms of section 34 read with section 48(2) of the Act.[75]

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[68] 2007 (4) SA 26 (C) 29.

[69] Act 103 of 1977.

[70] 2007 (4) SA 26 (C) 29.

[71] 2007 (4) SA 26 (C) 27. Specifically, the applicant requested the court to delete the condition stipulating that he had to submit plans of any new development to the first respondent for approval. Furthermore, the applicant requested the court to review and set aside the stop works order issued by the first respondent. Alternatively, the applicant sought a finding that the stop works order was invalid and of no force and effect.

[72] 2007 (4) SA 26 (C) 30.

[73] 2007 (4) SA 26 (C) 30.

[74] 2007 (4) SA 26 (C) 33.

[75] 2007 (4) SA 26 (C) 33.

In response, counsel for the first respondent argued that one had to consider the wording of section 48(2) to determine whether the conditions were *ultra vires*.[76] Counsel contended that section 48 had a wide, general application and was not only applicable in instances where a demolition permit had been granted under section 34 of the Act. Section 48(2) affords heritage resources authorities the discretion to either issue a permit or to refuse to issue a permit. The section further gives the heritage resources authorities the discretion, upon the issue of the permit, to impose conditions, terms and directions.[77] Section 48(2) stipulates that such conditions can 'include' those listed in paragraphs (a) to (d) of the section. The implication was that the heritage resource authorities could, in addition to the conditions imposed in paragraphs (a)-(d), impose any other conditions that they deemed suitable. As a result, the first respondent had acted within the power conferred on it by section 48 when it imposed the relevant condition.[78] Counsel for the respondent argued that the applicant had adopted an 'unduly narrow' and 'restricted interpretation' to section 48(2) of the Act.

Davis J explained that it was necessary to determine whether conditions could be imposed in instances where the applicant sought a permit for the demolition or alteration of a building older than 60 years. Explained differently, the question was whether section 34(1) envisaged 'either a stark positive or a negative response to an application' for demolition.[79] Counsel for the applicant argued that the correct interpretation for section 34(1) was the latter and that no additional powers were conferred on heritage authorities beyond those embodied in section 34(1) and (2) of the Act.

The court decided that there were three reasons in support of the finding that the first respondent did have the power to impose conditions when it issued a section 34 permit. Firstly, there is no indication in the Act that the respondent did not have the right to impose conditions to the permit allowing demolition of a house. Secondly, the

[76] 2007 (4) SA 26 (C) 34.

[77] 2007 (4) SA 26 (C) 34.

[78] 2007 (4) SA 26 (C) 34. Counsel for the first respondent argued that the first respondent had the power to impose any suitable condition 'by virtue of the wording of section 48(2)(c) or the residual power contained in section 48(2) to impose a condition'.

[79] 2007 (4) SA 26 (C) 34-35.

wording of section 48(2)(a) indicated that it was permissible for the respondent to attach conditions to the demolition permit issued in terms of section 34(1) of the Act.[80] Finally, due regard had to be given to the purpose of the Act. The powers of the first respondent would be unduly restricted by the assertion that section 48 is only applicable in instances where the buildings are protected under the formal protections of the Act. This implied that the first respondent would be excluded from preventing potential abuses in instances where the building was not protected under the formal protections of the Act. With reference to the long title and the preamble, the court held that a purposive interpretation of the Act indicated that the first respondent had wide – rather than narrow – powers to protect heritage resources in its province. Each application has to be considered 'on its own merits with reference to the statutory duties and responsibilities of first respondent to protect and manage the relevant heritage authorities'.[81] The first respondent's statutory duty was not limited to buildings for which an application for demolition was submitted. It was possible that the demolition of the annex could have a negative impact on another heritage resource, namely the villa. Section 48(2)(c) of the Act indicates that it is the legislature's intention to protect heritage resources situated in the vicinity of a building for which a demolition permit had been obtained.[82]

Counsel for the applicant argued that the court's interpretation of the Act would 'erode the very ownership rights of the applicants'.[83] In response, the court explained that ownership was no longer an absolute right, and under the Constitution emphasis

[80] 2007 (4) SA 26 (C) 36. Section 48(2)(a) stipulates that upon issuing a permit, heritage authorities may impose conditions, including a condition 'that the applicant give security in such form and such amount determined by the heritage resources authority concerned, having regard to the nature and the extent of the work referred to in the permit, to ensure the satisfactory completion of such work or the curation of objects and material recovered during the course of the work'. The court relied on this section to argue that section 48(2)(a) envisages the imposition of conditions when a permit in terms of section 34(1) is issued. For example, authorities can request of the land owners to give security when a house is demolished.

[81] 2007 (4) SA 26 (C) 36.

[82] 2007 (4) SA 26 (C) 36. In terms of section 48(2)(c) heritage authorities can, when granting a permit, impose a condition stipulating that 'design proposals be revised'.

[83] 2007 (4) SA 26 (C) 37.

has been placed on the exercise of ownership entitlements 'in accordance with the social function of the law and in the interest of the community'.[84] A balance must be struck between the protection of ownership and the exercise of ownership entitlements in relation to third parties, and the obligations that an owner has to the community. The court ruled that the Heritage Resources Act provides the framework in which ownership should now function. A purposive interpretation of its provisions enables the promotion of the objects of the Heritage Resources Act, without unfairly restricting ownership.[85] As a result, the application for the review and setting aside of the conditions was dismissed.

This decision was confirmed by the Supreme Court of Appeal in *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another.*[86] The court held that the conditions imposed by the first respondent were in accordance with 'its conservation mandate in terms of the Act and ... directly in line with the principles of heritage resources management set out in ss 5 and 6'.[87] It is clear that the imposition of the conditions was within the parameters of the Act and that it was in agreement with the general scheme of the Act.[88] These conditions were not imposed to control development, but rather to pursue the objectives of the Act, namely the preservation of historic buildings such as the villa.

4 3 3 2 The Gordon case 2005

An interesting issue was raised in *Provincial Heritage Resources Authority, Eastern Cape v Gordon*.[89] Specifically, the court had to establish whether the general protection of section 34(1) lapsed after the expiry of the section 34(2) three month period, in circumstances where the heritage authority had not taken steps to formally protect a

[84] 2007 (4) SA 26 (C) 37.

[85] 2007 (4) SA 26 (C) 37.

[86] 2008 (3) SA 160 (SCA).

[87] 2008 (3) SA 160 (SCA) para 19.

[88] 2008 (3) SA 160 (SCA) para 19.

[89] 2005 (2) SA 283 (E).

structure. The respondent purchased a house, named Cock's Castle, which was in such a state of disrepair that he presumed it would be relatively simple to obtain a section 34(1) permit for the demolition of the structure.[90] An application for a section 34(1) demolition permit was submitted to the PHRA for the Eastern Cape, who later informed the respondent that it would not approve the application as 'presently formulated' and suggested an on-site meeting to discuss the alterations to Cock's Castle.[91] The respondent interpreted this suggestion as a refusal to issue the demolition permit, and after the lapse of three months he continued to demolish the house. He adopted the stance that he could commence with the demolition of Cock's Castle since the demolition permit had not been granted, and since the building had not been considered for formal protection under the Act within the three month time period.[92] As a result, the

[90] 2005 (2) SA 283 (E) 286. The house was built by a well-known and affluent British Settler, William Cock, in the 1840s. Initially, William Cock named the house Richmond House, but the squared crennellations, castellated walls and parapets gave the house a 'fortified appearance' and later it became known to the local community as 'Cock's Castle'. Upon purchasing the property, the respondent approached an architect to design a house to be built on the property once Cock's Castle was demolished. This house was similar in style to a Cape Dutch mansion and completely different from Cock's Castle.

[91] 2005 (2) SA 283 (E) 286-289. This was the final of a series of demolition applications submitted by the respondent. The first application was lodged with the National Monuments Council of the Eastern Cape, a statutory body created in terms of the 1969 Monuments Act. This Act was later repealed and replaced by the Heritage Resources Act. As a result, a second application had to be submitted to the PHRA for the Eastern Cape as required by section 34(1) of the Act. Unfortunately, the relevant MEC had failed to appoint a PHRA and the respondent's application was heard by another body, namely the Interim Provincial Committee, Eastern Cape (Permit Committee). The respondent later initiated proceedings in the High Court, and it was determined that the SAHRA had not validly delegated the power to decide on applications such as the respondent's to the Permit Committee of the Eastern Cape. A PHRA was established sixteen months after the High Court judgment and only after a series of attempts by the respondent and his counsel to secure the creation of a PHRA for the Eastern Cape. The respondent submitted an application for a demolition order to the newly established PHRA for the Eastern Cape and it is this application that formed the subject matter of the dispute.

[92] 2005 (2) SA 283 (E) 290.

applicant obtained a *rule nisi* to interdict the respondent from continuing with the demolition and alteration of Cock's Castle.[93]

The core of this decision lies in the second leg[94] of the court's enquiry, namely the correct interpretation of section 34(1) and (2) of the Act. Essentially, the court had to determine whether section 34 operates as a two-tier process.[95] Section 34(1) embodies the first tier of the process, where a property owner applies for permission to alter or demolish a building that is older than 60 years. The second tier of the process is activated when the abovementioned permission is denied and the building has to be considered for formal protection under the Act.[96] In this regard, the respondent argued that property owners have the right to demolish buildings without a permit in instances where a demolition permit has been denied and the building has not been considered for formal protection within the stipulated three-month period.

The court disagreed with the respondent's interpretation of section 34(1) and 34(2) 'since it read into the statute something which the Legislature has not specifically prescribed *viz*, that protection under section 34(1) shall lapse if an application for a permit is refused but formal protection is not thereafter extended within the period prescribed by section 34(2)'.[97] There are three reasons for protecting a building even though it had not previously been placed under formal protection. Firstly, a building can because of 'some significant historical event' become more worthy of preservation even though the building was not previously placed under formal protection after a demolition permit had been denied.[98] Secondly, a series of administrative steps has to be taken prior to the declaration of a property as a heritage site; for example, the mortgage bond holder, owner, occupiers and conservation bodies should be informed so that they can

[93] 2005 (2) SA 283 (E) 286.

[94] 2005 (2) SA 283 (E) 291-293. In the first leg of the enquiry the court had to determine whether, on the facts of the case, it could be said that the demolition permit had actually been denied. The court found that it could not be said that the demolition permit had been refused.

[95] 2005 (2) SA 283 (E) 292.

[96] 2005 (2) SA 283 (E) 292.

[97] 2005 (2) SA 283 (E) 293.

[98] 2005 (2) SA 283 (E) 293.

make submissions to the PHRA. Thirdly, a heritage resource authority might, due to a lack of funds, not have been able to extend formal protection to a heritage resource. However, this did not mean that the heritage resource was not worthy of conservation or that it would not be placed under formal protection in the future.[99]

The respondent's argument was founded on the supposition that it was the legislature's intention to protect buildings under the formal protections of the Act and that section 34 only had two functions. These functions are, firstly, to provide a mechanism in terms of which potential buildings can be identified and, secondly, to provide a period of interim protection during which time a decision will be taken as to whether or not a building should be placed under formal protection.[100] The court explained that there was no indication in the Act that section 34(1) and (2) should be interpreted narrowly. Section 34 of the Act indicated that no building older than 60 years can be demolished without a permit. One could only depart from the clear, ordinary and grammatical meaning of section 34 if it resulted in absurd or anomalous results.[101] In this regard the court held that:

> '[i]t may well be that section 34 is a means by which buildings suitable for formal protection under Part 1 of Chapter II may be indentified for formal protection, but in my view continued protection under section 34(1) following a failure to afford such formal protection within a period of three months following the refusal of a permit does not lead to any absurd or anomalous results that justify the conclusion that the Legislature must in fact have intended protection under the section to fall away'.[102]

A final issue addressed by the court was the fact that the house had been in a state of partial demolition for about three years. The court reasoned that even though the respondent had demolished and altered extensive parts of the house, the demolition was not yet complete.[103] It was clear that experts deemed Cock's Castle historically significant, and there was a possibility that the heritage authorities would proceed to

[99] 2005 (2) SA 283 (E) 293.

[100] 2005 (2) SA 283 (E) 293-294.

[101] 2005 (2) SA 283 (E) 294.

[102] 2005 (2) SA 283 (E) 294.

[103] 2005 (2) SA 283 (E) 294.

declare the property a heritage site as required in section 27 of the Act. Furthermore, it was likely that a section 45 compulsory restoration order would be served on the respondent once the building was formally declared a heritage site.[104] Accordingly, the rule *nisi* was confirmed as the interdict was a necessary precaution to prevent the respondent from causing any further damage to the property.[105]

4 3 3 3 The Corrans case 2009

Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape, *and others*[106] shows that the courts are wary to interfere with a heritage authority's decision to refuse a demolition permit. In this case the applicant sought the review and setting aside of a decision taken by the PHRA to allow a conditional partial demolition of a structure described as an 'a simple wood and iron home' dating back to the late 1800s or early 1900s.[107] The court explained that the structure hardly paid homage to 'our own forebears' architectural achievement'.[108]

It was evident that the applicant purchased the property to expand her guesthouse, which she operated from the neighbouring property. She applied to the PHRA for a demolition permit and her application was accompanied by architectural drawings of the structure to be built on the property, as well as letters from a local historical society and the regional tourism agency. Both letters expressed their support

[104] Section 45(1)(a) of the National Heritage Resources Act 25 of 1999 stipulates that if the heritage authority is of the view that a heritage site has been allowed to fall into a state of disrepair for the purpose of '(i) effecting or enabling its destruction or demolition; (ii) enabling the development of the designated land; or (iii) enabling the development of any land adjoining the designated land; or (b) is neglected to such an extent that it will lose its potential for conservation', the heritage authority may serve on the owner an order to repair or maintain such a site, within a specific time period, and to the satisfaction of the authority.

[105] 2005 (2) SA 283 (E) 295.

[106] 2009 (5) SA 512 (ECG).

[107] 2009 (5) SA 512 (ECG) para 2.

[108] 2009 (5) SA 512 (ECG) para 2.

for the demolition of the structures.[109] The application was considered by the PHRA, who decided that the applicant could partially demolish the buildings, provided that she complied with the conditions prescribed by the authority. In response, the applicant launched an appeal on the ground that the PHRA did not provide reasons for its decision. She contended that she had consulted with experts who deemed it unnecessary to preserve the structure, as it was impractical and totally uneconomical to do so.[110] Moreover, she argued that the building was vacant, uninhabitable, and particularly vulnerable to a criminal element and a fire risk.[111] This appeal was dismissed on the grounds that the building was situated in an historic part of the town, and it formed part of a precinct of similar buildings. The building's facade was deemed to be a valuable component of the town's landscape and it was in a reasonable condition. It was possible for the owner to keep the front facade and related buildings in its original state while developing the remainder of the site.[112] The appeal board suggested that the front facade and related buildings should be restored and that the original plaster should not be removed from the walls.[113]

The applicant relied on the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in support of her application for review. Specifically, with reference to section 6(2)(a)(i) of PAJA, the applicant alleged that the PHRA did not have the requisite jurisdiction to consider her application. Alternatively, she argued that, should the court find that the PHRA did have the jurisdiction to hear the application, it had taken irrelevant considerations into account and that it had ignored important considerations.[114] Furthermore, the applicant's decision was not rationally connected to

[109] 2009 (5) SA 512 (ECG) para 4.

[110] 2009 (5) SA 512 (ECG) para 5.

[111] 2009 (5) SA 512 (ECG) para 5.

[112] 2009 (5) SA 512 (ECG) para 6.

[113] 2009 (5) SA 512 (ECG) para 6.

[114] 2009 (5) SA 512 (ECG) para 8. The applicant relied on section 6(2)(e)(iii) of Act 3 of 2000 to argue that the heritage authority had taken irrelevant considerations into account when making a decision.

the purpose for which it was taken, the purpose of the empowering legislation, the information before it and the reasons given by the PHRA.[115]

The first ground for review was dismissed by the court.[116] More relevant to this discussion is the court's findings with regard to the second ground for review. In this regard the court explained that the main thrust of the applicant's argument was that the building was comparable to a shack and of 'no redeeming cultural significance'.[117] With reference to the overall scheme of the Act, the court held that the individuals who are responsible for identifying and protecting heritage resources are appointed for their knowledge and experience in the field of heritage preservation. Part 2 of Chapter I of the Act stipulates that members of the SAHRA and PHRAs must have 'special experience or interests in fields relevant to heritage resources'.[118] Instead of challenging the expertise of the PHRA's permit and appeal committees, the applicant argued that the decision to refuse the complete demolition of the structure was wrong. It is the duty of the court to respect the policy decisions and factual findings of a decision-making body in instances where the decision corresponds with the general scheme of the legislation.[119] The court found that there was no need for judicial intervention in this case. The PHRA had acted within its statutory powers and the partial demolition order was granted in pursuance of one of the goals of the Act, namely the preservation of buildings that are culturally and historically significant.[120]

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[115] 2009 (5) SA 512 (ECG) para 8. The applicant relied on section 6(2)(f)(ii) of Act 3 of 2000 in support of this argument.

[116] 2009 (5) SA 512 (ECG) paras 9-17.

[117] 2009 (5) SA 512 (ECG) paras 19.

[118] 2009 (5) SA 512 (ECG) para 21.

[119] 2009 (5) SA 512 (ECG) para 21. In this regard, the court referred to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 48, where the Constitutional Court emphasised the importance of the principle of due deference.

[120] 2009 (5) SA 512 (ECG) para 23.

4 3 4 Analysis of the cases

Section 34(1) and (2) of the Heritage Resources Act appears to be a relatively uncomplicated provision. However, the three cases discussed above show that section 34 places greater limitations on land owners' rights than appears from a first reading of the section. One of the principal conclusions to be drawn from the cases is that there are instances where ownership, and particularly the owner's right to develop her property, has to yield to the greater needs of the public. Within the context of heritage preservation, it is expected of the owner to refrain from demolishing buildings that are considered valuable by the general public or even a specific community. It is also expected of the owner, at his own expense, to maintain the building on behalf of the public once it is formally protected under the Act.

Both the *Corrans* and *Gordon* decisions made it clear that property owners can no longer presume that it would be relatively simple to obtain a demolition permit for a building situated on their property. The *Gordon* case emphasised that the owner will not be allowed to demolish a building that is older than 60 years, even though the heritage authority had previously failed to place that building under formal protection as prescribed by section 34(2). Rather, it is expected of the owner to apply, and if necessary re-apply, to the heritage authority for a section 34(1) demolition permit. *Corrans* illustrates that the fact that the owner, or anyone else for that matter, considers the building unappealing or unimportant is irrelevant and will not be taken into account by the heritage authorities. Owners must accept that it could be expected of them to preserve buildings that represent cultures or histories to which they attach no relevance.

What is more, *Qualidental* confirms that the heritage authority has generous powers to fulfil the obligations set out in the Act. These powers include the right to impose conditions in relation to the demolition of the building. For example, the heritage authority in *Corrans* granted a partial demolition permit, provided that the owner preserved the facade of the building as well as the plaster that covered the walls. It is also in heritage authorities' power to impose conditions relating to a building other than the one for which a demolition permit is sought. In *Qualidental* the owner was permitted to demolish the annex but not the villa. The conditions in *Corrans*, as well as in

Qualidental, had the potential to inhibit further development on the respective properties. Those conditions stipulated that any new development had to be secondary, in terms of size and scale, to the historic buildings on the property. It was expected of the owner in *Qualidental* to submit any building plans for new developments to the heritage authority for approval. The implication was that even if the plans complied with all other statutory provisions, such as conditions of title or zoning scheme regulations, there was still a possibility that those plans could fall foul of section 7(1)(a) of the Building Standards Act. Explained differently, the Heritage Resources Act constitutes 'any other applicable law' for purposes of section 7(1)(a) of the Building Standards Act.[121] In essence, the Heritage Resources Act imposes another layer of limitations on ownership, over and above those limitations already imposed by, for example, the Building Standards Act, zoning schemes and conditions of title.

In addition to significantly limiting the owner's right to use, enjoy and develop his property, the Heritage Resources Act authorises the heritage authority to impose positive obligations on the owner. On the one hand, these obligations and limitations collectively have the potential to erode ownership entitlements. On the other hand, property owners should by now have realised that the ownership of land, on which historic buildings are situated, is accompanied by a set of responsibilities. The very nature of the property dictates the type of limitations and responsibilities that are imposed on ownership. Stated differently, certain kinds of property are accompanied by certain types of responsibilities and limitations. The owner owes it to the community to protect the culturally or historically significant buildings situated on his property.[122]

Not one of the owners in the cases succeeded in having the heritage authorities' decisions to deny the demolition permits set aside. In *Corrans* the court was unwilling to entertain allegations that the heritage authority's decision to deny a demolition permit was wrong. The generous interpretation of the Act in *Qualidental* enabled the court to find that it was not beyond the scope of the heritage authority's powers to grant a partial

[121] See the discussion of section 7(1)(a) of the National Building Standards and Building Regulations Act 103 of 1977 in chapter 3, section 3 4 3 2 1 above.

[122] Chapter 6 elaborates on the social responsibilities of the land owner. The obligations of the land owner in the context of historic preservation is discussed in chapter 6, section 6.4.

demolition order subject to certain conditions. Likewise, it was held in *Gordon* that it was in the heritage authority's power to deny the owner a demolition permit on more than one occasion even though the building was not formally protected by the Act. These decisions should not be perceived as a rubber stamp for all decisions taken by heritage authorities in the future. On the contrary, property owners should explore alternative remedies in the form of administrative law or a section 25(1) constitutional enquiry. The constitutional implications of section 34 of the Heritage Resources Act (and any decision taken in terms of the Act) are discussed in chapter 5. At this stage it suffices to say that section 34(1) authorises the heritage authority to impose a section 25(1) deprivation of property in certain instances. Whether or not this will amount to an arbitrary deprivation of property will depend on the unique circumstances of the specific dispute.

Finally, the court confirmed in *Gordon* that an owner does not automatically obtain the right to proceed with the demolition of a building where the application for a demolition permit had been denied and the building has not been considered for formal protection within three months as required by section 34(2). This aspect of the judgment can be criticised in three respects. Firstly, the fact that an owner can be prohibited from demolishing a building because of the possibility that it can later become more worthy of preservation is bizarre. Arguably, the heritage authority should be compelled to assess the historic or cultural value of the building at the time when the application for a demolition permit is submitted. Secondly, section 34(2) prescribes a three-month period during which time the building should be considered for formal protection. Surely it would be more beneficial for all parties concerned to place a property under section 29 provisional protection in instances where the heritage authority cannot operate within the three-month time limitation prescribed by section 34(2). This will provide, to some extent, legal certainty with regard to the status of the building and the responsibilities of the owner. Thirdly, the section 34 general protection measure does prohibit the demolition of buildings older than 60 years, but it does not expressly compel an owner to maintain a building. Moreover, there is no incentive for the owner to maintain a building which could possibly be demolished. Some property owners are likely to neglect buildings with the sole intent to obtain a demolition order.

4 4 Demolition rights within the context of US heritage preservation law

4 4 1 Introduction

Van der Walt explains that the law of the United States of America (US law) recognises two types of state interferences with private property rights, namely the expropriation of property for public use and regulation of the use of property in the public interest.[123] These interferences are referred to as the power of eminent domain (expropriation) and the exercise of the state's police power (deprivation) respectively.[124] Both interferences must be for a public purpose, or in the interests of public welfare, and must comply with the due process requirement.[125] Traditionally, the police power principle provides that the state can, by way of legislation, regulate the exercise of ownership entitlements for purposes of the health, safety and welfare of the public. Legislation that is directly related to one of these objectives can place even relatively severe limitations on property rights. These regulatory limitations of ownership are uncompensated because they are imposed for a valid public purpose.[126] However, Van der Walt explains that

[123] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 398-400 and 403. Van der Walt explains that the US property clause is contained in the Fifth Amendment (1791), read with the Fourteenth Amendment (1868) to the Constitution of the United States of America 1787. The Fifth Amendment provides that no person shall be deprived of property without the due process of the law, nor shall private property be taken for public use without compensation. Van der Walt explains that in 1833, the US Supreme Court declared that the Fifth Amendment was only applicable to the federal government and not to the individual states. The Fourteenth Amendment, which is applicable to the states, contains a due process clause but, unlike the Fifth Amendment, it does not contain a takings clause. However, in 1897, the Supreme Court held that a taking of property without compensation violated the due process provision in the Fourteenth Amendment. In so doing, the Supreme Court effectively read the Fifth Amendment takings clause into the due process clause of the Fourteenth Amendment. The takings clause is therefore also enforceable in the individual states. Many of the constitutional property disputes in America concern the question of whether there has been a taking of private property. In many of these disputes the courts essentially have to determine whether a specific exercise of the police power has gone too far, or has amounted to a taking of property for public use without compensation.

[124] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 403.

[125] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 403.

[126] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 412.

once a regulation moves out of the limited sphere of protection for purposes of public health and safety, the state interference into property rights must not go too far, even if the regulation 'was ostensibly imposed to protect public health and safety'.[127] In *Pennsylvania Coal Co v Mahon*,[128] the United States Supreme Court (the Supreme Court) confirmed that an exercise of police power that goes too far will amount to a taking of property for which a land owner should be compensated.

Apart from the regulatory taking qualification, the US courts have accepted a wider application of the state's police power by upholding regulatory measures that fall outside of the limited sphere of public health and safety. An example of the wider application of the police power principle is *Village of Euclid v Amber Realty Co*,[129] where the Supreme Court explained that land-use regulations such as those imposed by zoning laws 'must find their justification in some aspect of the police power, asserted for the public welfare'.[130] The Supreme Court concluded that the relevant zoning law was enacted in the public welfare and that it imposed constitutional limitations on ownership.[131] Similarly, in *Berman v Parker*,[132] the Supreme Court confirmed the constitutional validity of legislation that provided for the aesthetic improvement and redevelopment of a poor and decaying neighbourhood. In so doing, the Supreme Court adopted the view that a wider range of interests could justify the statutory restriction of private property rights. The Supreme Court explained that the exercise of the police power was not limited to matters of public health and safety; morality; peace and quiet and law and order, although those purposes make up the core of the police power. Public welfare is a broad and inclusive concept, and the values that 'it represents are spiritual as well as physical, aesthetic as well as monetary'.[133] The legislator has the power to 'determine that the community should be beautiful as well as healthy, spacious as well as clean,

[127] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 414.

[128] 260 US 393 (1922).

[129] 272 US 365 (1926).

[130] 272 US 365 (1926) 387.

[131] 272 US 365 (1926) 395.

[132] 348 US 26 (1954).

[133] 348 US 26 (1954) 33.

well balanced as well as carefully patrolled'.[134] Importantly, regulatory actions that fall outside the category of protection of public health and safety will be subject to stricter scrutiny. Together, these decisions afford a generous interpretation to the public welfare concept, which justifies the enactment of historic preservation laws designed to protect privately owned historic buildings.[135]

New York City was the first city in the United States of America to enact a landmark preservation law and a historic district plan.[136] The American legislature soon followed by enacting the National Historic Preservation Act of 1966[137] and by the time the infamous *Penn Central Transportation Company v City of New York* (*Penn Central*)[138] was decided, 50 American states and over 500 municipalities had enacted historic preservation laws and historic district ordinances.[139] These laws protect historically valuable buildings by prohibiting their demolition or alteration without a

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[134] 348 US 26 (1954) 33.

[135] Refer to Caravello DT 'From *Penn Central* to *United Artists' I & II*: the rise to immunity of historic preservation designation from successful takings challenges' (1995) 22 *B C Envtl Aff L Rev* 593-622, for an overview of the origins of the US historic preservation movement. Carravello explains that it was especially *Berman v Parker* 348 US 26 (1954) that prompted the nationwide enactment of historic preservation ordinances.

[136] Caravello DT 'From *Penn Central* to *United Artists' I & II*: the rise to immunity of historic preservation designation from successful takings challenges' (1995) 22 *B C Envtl Aff L Rev* 593-622 at 601.

[137] Fowler JM 'Federal historic preservation law: National Historic Preservation Act, Executive Order 11593, and other recent developments in federal law' (1976) 12 *Wake Forest L Rev* 31-74 at 31, and to the same effect, Caravello DT 'From *Penn Central* to *United Artists' I & II*: the rise to immunity of historic preservation designation from successful takings challenges' (1995) 22 *B C Envtl Aff L Rev* 593-622 at 602. Fowler explains that the National Historic Preservation Act 1966 was the first federal law that protected privately owned historic buildings. Previously, the historic preservation laws provided for the protection of national monuments, but the wealth of historic properties held in private ownership were ignored. For a detailed account of the origins and operation of federal historic preservation laws, refer to Fowler JM 'Federal historic preservation law: National Historic Preservation Act, Executive Order 11593, and other recent developments in federal law' (1976) 12 *Wake Forest L Rev* 31-74 and Kenneth Kyre K 'Historic preservation cases: a collection' (1976) 12 *Wake Forest L Rev* 227-274 at 258-265.

[138] 438 US 104 (1978).

[139] *Penn Central Transportation Company v City of New York* 438 US 104 (1978) 107.

permit or the consent of a commission.[140] In some instances, property owners approached the courts asserting that the limitation on their demolition rights has gone too far and that it caused a regulatory taking of their property, for which they should be compensated.[141] However, apart from the regulatory taking qualification, the *Penn Central* decision dispelled any uncertainty about the general constitutional validity of preservation laws. Unless preservation laws go too far (in which case they might bring about a regulatory taking that requires compensation), they are generally regarded as legitimate and valid regulatory limitations on the use of private property. The *Penn Central* decision provided a three-pronged enquiry for determining whether a statutory regulation has gone too far and caused a regulatory taking of property. This test has been applied by the courts to determine the circumstances where it would be unconstitutional to deny an owner the right to demolish a historic building.

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[140] Caravello DT 'From *Penn Central* to *United Artists' I & II*: the rise to immunity of historic preservation designation from successful takings challenges' (1995) 22 *B C Envtl Aff L Rev* 593-622 at 601. Caravello refers to the New York City's Landmark Preservation Law, which prohibits an owner to demolish, alter or even restore a structure without the consent of the Landmark Preservation Commission.

[141] As explained above, in *Pennsylvania Coal Co v Mahon* 260 US 393 (1922), the Supreme Court confirmed that exercises of the police power that go too far will be considered takings for which the land owner has to be compensated. Many of the historic preservation disputes concern the issue of whether limitations, imposed by land owners by historic preservation laws, amount to takings without compensation. See for example *City of Annapolis v Anne Arundel County* 217 Md 265 (1974); *Maher v the City of New Orleans* 516 F 2d 1051 (1975); *First Presbyterian Church of York v City Council of the City of New York* 25 Pa Cmwlth 154 (1976) and *Penn Central Transportation Company v City of New York* 438 US 104 (1978). Van der Walt AJ explains in *Constitutional property clauses: a comparative analysis* (1999) 411 that typically, a constitutional challenge to the validity of a statutory regulation can take one of two forms. Firstly, plaintiffs can assert that the exercise of the police power had brought about a regulatory taking of property. A regulatory taking of property occurs when statutory regulation of the use of property goes too far and has the effect of expropriating an owner of his property without compensation. The purpose of this line of attack is to obtain compensation. Secondly, on the basis of the principle of due process, the plaintiffs can question the legitimacy of the specific exercise of the police power. Both lines of attack can result in the regulation being declared invalid.

The discussion below is centred on the *Penn Central* decision as it is the most important US landmark preservation case to date.[142] This discussion comprises of four sections. The first section provides an overview of historic preservation cases decided before *Penn Central*. This is followed by a more detailed description of the *Penn Central* decision. The section also refers to *Lucas v South Carolina Coastal Council*,[143] where the Supreme Court formulated an exception to the principles enunciated in *Penn Central*. Finally, the section considers the implication of *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*,[144] where the Supreme Court explained the interaction between the *Penn Central* and *Lucas* decisions. The third section shows how the courts have applied the *Penn Central* principles to subsequent demolition cases. Concluding remarks follow in the final section.

4 4 2 Pre-Penn Central cases

Analysis of the pre-*Penn Central* case law reveals that the US courts were generally unsympathetic to the argument that heritage preservation laws are an invalid exercise of the police power principle. For example, in *Maher v the City of New Orleans*,[145] the

[142] Refer to Dukeminier J, Krier JE, Alexander GS and Schill MH *Property* 6ed (2006) 990-1006, for a comprehensive discussion of this landmark decision. See also, Rubenfeld J 'Usings' (1993) 102 *Yale L J* 1077-1163 at 1089-1090, 1094-1095, 1101 and 1106.

[143] 505 US 1003 (1992) 1015. Refer to Dukeminier J, Krier JE, Alexander GS and Schill MH *Property* 6ed (2006) 1006-1025 for a discussion of this decision.

[144] 535 US 302 (2002). Refer to Dukeminier J, Krier JE, Alexander GS and Schill MH *Property* 6ed (2006) 1031-1042 for a discussion of this case.

[145] 516 F 2d 1051 (1975). *Maher* is a well-known historic preservation case as it concerns one of the more famous historic districts, namely the French Quarter in New Orleans, also known as Vieux Carre. In accordance with the provisions of the Vieux Carre Ordinance, the plaintiff sought a demolition permit for a Victorian cottage situated in the French Quarter. The plaintiff intended to construct an apartment block on the property once the cottage had been demolished. Unsurprisingly, the application for a demolition permit was unsuccessful and the plaintiff approached the court for relief. At issue in this case was whether the denial of the demolition permit amounted to a taking of private property, for which the plaintiff had to be compensated.

court emphasised that the boundaries of police power are 'both ample and protean'.[146] The court explained that it is expected of the legislator to rely on its rich and flexible police power to cater for economic and cultural developments and to provide novel solutions to new problems.[147] This may require, and will continue to require, stricter regulations on the use of land in especially urban areas.[148] Accordingly, the exercise of the state's police power should not be restricted. Each dispute should be determined with reference to its own facts, and in light of the existing circumstances and needs of the community.[149] Furthermore, the police power not only functions to prevent unhealthy conditions but also to foster the 'ends' that the community deems valuable.[150] In light of the nationwide sentiment that the country's heritage should be protected, and considering the unique characteristics of the French Quarter, the court concluded that the objectives of the Vieux Carre Ordinance fell within the scope of the police power.[151]

It appears as if the courts have developed different tests, depending on whether the building had been designated as a landmark or is situated in a historic district, to determine whether the denial of a demolition permit amounts to a taking of property in a particular case. Despite these different standards, case law reveals that it was only in very specific circumstances that the denial of a demolition permit constituted a taking of property. The courts have also drawn a distinction between historic landmarks held for charitable and for commercial purposes respectively. In one of the earlier historic

[146] 516 F 2d 1051 (1975) paras 10-11.

[147] 516 F 2d 1051 (1975) paras 10-11.

[148] 516 F 2d 1051 (1975) paras 10-11.

[149] 516 F 2d 1051 (1975) paras 10-11.

[150] 516 F 2d 1051 (1975) para 13.

[151] 516 F 2d 1051 (1975) para 15. Similarly, in *Figarsky v Historic District Commission of the City of Norwich* 171 Conn 198 (1976) 207-209, the court relied on *Village of Euclid v Amber Realty Co* 272 US 365 (1926); *Berman v Parker* 348 US 26 (1954) and *Maher v the City of New Orleans* 516 F 2d 1051 (1975) to find that that the preservation of buildings within a historic district was in the public interest. The court in *Figarsky* concluded that the relevant historic-district ordinance was a valid exercise of police power.

landmark cases, *Trustees of Sailor's Snug Harbor in City of New York v Platt*,[152] the court held that in the case of commercial property it was necessary to determine whether the denial of a demolition permit prevented the owner from obtaining an adequate return on its investment.[153] A comparable test for property held for charitable purposes was whether the protection of a building physically or financially prevented, or seriously interfered with, the carrying out of the charitable purpose.[154] The court explained that this had to be established when it determined whether the preservation of the building interfered with the use of the property. It was also necessary to determine whether the buildings could be converted into a useful purpose without excessive costs. Finally, the court had to determine whether maintenance costs would be excessive.[155]

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[152] 29 AD 2d 376 (1968). For a more detailed discussion of this case, refer to Kenneth Kyre K 'Historic preservation cases: a collection' (1976) 12 *Wake Forest L Rev* 227-274 at 252-254.

[153] 29 AD 2d 376 (1968) 378.

[154] 29 AD 2d 376 (1968) 378. This decision was followed in *Lutheran Church in America v the City of New York* 35 NY 2d 121 (1974), where the court had to determine the constitutional validity of the designation of a property owned by a religious institution as a landmark in accordance with the New York Landmark Preservation Law 1965. The owner of the designated building intended to demolish the building and to replace it with a structure that would be more suited to his needs. The majority of the court found that the designation of the property amounted to a 'naked taking' since the current building was not suited to the needs of the owner, and the designation prevented it from replacing it with a more suitable building. For a discussion of this case refer to Kenneth Kyre K 'Historic preservation cases: a collection' (1976) 12 *Wake Forest L Rev* 227-274 at 25-255. For a more complete overview of the challenges that non-profit organizations face in relation to historic preservation refer to Faller C 'Economic hardship and historic preservation of non-profits: balancing individual burden with community benefit' (2008) paper 28 *Georgetown Law Historic Preservation Paper Series* 1-27 http://scholarship.law.georgetown.edu/hpps_papers/28. Essentially, Faller argues that the courts have interpreted the *Snug Harbour* test so restrictively that it seems that non-profit organisations have exactly the same burden of proof than owners of commercial property. To show that the denial of a demolition permit amounts to a taking of property, non-profit owners must prove that they will not obtain a reasonable return on their investment. In support of her argument she refers to the courts' restrictive interpretations of the test in *The Society for Ethical Culture in the City of New York v Spatt* 415 NE 2d 922 (1980) and *St Bartholomew's Church v City of New York* 914 F2d 348 (2nd Cir 1990).

[155] 29 AD 2d 376 (1968) 378.

Texas Antiquities Committee v Dallas County Community College District[156] is an excellent example of where the inability of the owner to demolish a landmark amounted to a taking of the property. The College District (the College) was the owner of three buildings that were so dilapidated that the City of Dallas permitted the temporary use of the buildings, on condition that they would be demolished within five years.[157] The Texas Antiquities Committee (the Committee) opposed the demolition of the buildings on the grounds that the buildings were included in the National Register for Historic Places. In support of its argument the Committee relied on the general provisions of a regional antiquities statute, despite the fact that the buildings were not formally protected by that statute.[158] The court held that denial of the demolition permit was unconstitutional because the College District did not have the funds to maintain or to restore the buildings.[159] Evidence showed that the restoration of the buildings would exhaust the College's funds, which were reserved for education purposes.[160] The restoration of the buildings would also have created five times more space than the College required. Moreover, the buildings were in such a bad state that their foundations would have had to be rebuilt. Every sample taken from the sandstone from which the buildings were built, had crumbled. Even if the buildings were restored at great expense, they could only be leased as commercial space. This was impractical since the building was situated in the middle of an 'inappropriate academic community'.[161] Twenty percent[162] of the buildings in that area were already vacant, and there was no guarantee that the College would be able to find a commercial lessee once the buildings were restored. The buildings took up space that could otherwise be used for educational purposes. The decisive factors in this case were, accordingly, that

[156] 554 SW 2d 924 (1977).

[157] 554 SW 2d 924 (1977) 926.

[158] 554 SW 2d 924 (1977) 926-929. The court found that the Committee did not have the authority to hear permit applications for buildings that it had not designated. Accordingly, the owner did not even have to apply to the Committee for a demolition permit.

[159] 554 SW 2d 924 (1977) 926 and 928.

[160] 554 SW 2d 924 (1977) 928.

[161] 554 SW 2d 924 (1977) 929-930.

[162] 20%.

the buildings were so dilapidated that restoration was prohibitively expensive; that the College did not have any use for the restored buildings; and it was unlikely that it would be able to offset the cost of restoration against rental income. Finally, the restoration costs would have absorbed funds that were set aside for education purposes. The court granted the demolition permit as it was clear that preservation of the building imposed a disproportionate burden on the owner.[163]

In *Maher v the City of New Orleans*,[164] the court had to determine whether the denial of a demolition permit for a building situated in a historic district amounted to a taking of property. The plaintiff alleged that the Vieux Carre Ordinance overstepped the boundaries of the state's police power by requiring him to maintain the building at his own expense.[165] The court explained that a plaintiff would not make out a case for a taking simply by showing that the law required of him to apply for a demolition permit and that his application may be unsuccessful.[166] Rather, he would have to show that all 'potential use of the property was foreclosed'.[167] This meant that the plaintiff had to prove that denial of a demolition permit so diminished his property's value that he was in effect left with nothing.[168] More specifically, the plaintiff had to show that it was impractical to sell or to commercially lease the property, or that he had no other uses for his property.[169] The court held that the fact that a property owner had been deprived of the most profitable use of property did not necessarily mean that a taking had

[163] 554 SW 2d 924 (1977) 930.

[164] 516 F 2d 1051 (1975). For a more detailed discussion of *Maher v the City of New Orleans* 516 F 2d 1051 (1975), refer to Kenneth Kyre K 'Historic preservation cases: a collection' (1976) 12 *Wake Forest L Rev* 227-274 at 243-245 and 247.

[165] 516 F 2d 1051 (1975) paras 22-23.

[166] 516 F 2d 1051 (1975) para 21.

[167] 516 F 2d 1051 (1975) para 21.

[168] 516 F 2d 1051 (1975) paras 22-23.

[169] 516 F 2d 1051 (1975) paras 22-23. In an earlier decision, *Mayor and Aldermen of the City of Annapolis v Anne Arundel County* 271 Md 265 (1974) 294, the court held that it had to determine whether the denial of a demolition permit in accordance with a historic district ordinance denied the owner all reasonable use of the building. The court decided that the ordinance only limited the destruction of the exterior of the building. This limitation was deemed to be a mild and therefore a constitutionally valid limitation of the property owner's rights.

occurred.[170] Furthermore, the fact that the owner would be required to bear the financial burden of maintaining the building did not necessarily mean that a taking had occurred either. The court decided that the maintenance provisions were constitutional as they were consistent with the preservation objectives of the Vieux Carre Ordinance. However, this decision did not mean that the application of the maintenance provisions would be 'beyond constitutional assault'.[171] The court explained that each case had to be decided on its own merits, and that it could not exclude the possibility that the maintenance costs would in some instances be so excessive as to constitute a taking.[172]

Maher v the City of New Orleans[173] was followed in *The First Presbyterian Church of York v City Council of the City of York*,[174] where it was decided that, since the appellant was unable to prove that it was impractical to sell or to commercially lease the house, it could not be said that his property had been taken for a public purpose. The appellant could not prove that it had no other use for the house either.[175] By contrast, in *Wolk v Reisem, Chairman, et al, constituting the Rochester Preservation Board*[176] the court held that it was arbitrary to deny a demolition permit if the building constituted a danger to life and property. The building in question was situated within a preservation district. It had stood vacant since 1973 and had been vandalised on more than one occasion. It had been declared unsafe and dangerous to public safety, life and property by the Rochester Buildings Commissioner and a Fire Marshall had recommended demolition of the building as it posed a danger to the lives of fire fighters.[177] It was the opinion of the heritage authority that instead of being demolished, the building should be

[170] 516 F 2d 1051 (1975) para 20.

[171] 516 F 2d 1051 (1975) para 24.

[172] 516 F 2d 1051 (1975) para 24.

[173] 516 F 2d 1051 (1975).

[174] 25 Pa Cmwlth 154 (1976).

[175] 25 Pa Cmwlth 154 (1976) 161-162.

[176] 413 NYS 2d 60 (1979). This case was decided shortly after *Penn Central*, yet no mention was made of this important judgment. It is for that reason that it this case is discussed under this section and not under the section below that discusses post-*Penn Central* case law.

[177] 413 NYS 2d 60 (1979).

converted into an income-producing structure.[178] The heritage authority was further of the view that demolition of the building 'would damage the integrity of the streetscape and further reduce the inventory of original structures which gives East Avenue its unique character in the City of Rochester'.[179] In response, the court held that the decision to deny the demolition of the building was arbitrary and unsupported by the facts of the case.[180] The court concluded its judgment by stating that:

> '[i]n the face of a clear threat to the public health and safety, the governmental duty to its citizens and civil servants to protect such vital interests must take precedence over the aesthetic and historical concerns expressed by the majority of the Preservation Board in denying petitioner's application..'[181]

Even though the courts formulated different tests for single landmarks and buildings situated in a historic district respectively, there is an underlying theme in these cases, namely that the enactment of legislation that protects historically valuable buildings held in private ownership, is a permissible exercise of the state's police power. Limitations imposed on an owner's demolition rights by historic preservation legislation are generally constitutional. Likewise, the fact that a historic preservation law imposes a positive duty on the owner to maintain the building does not automatically mean that a taking had occurred. Each case has to be assessed with reference to its unique set of facts. To show that the denial of a demolition permit constitutes a taking of his property, a property owner would have to prove that he was deprived of all uses of its property. On the basis of the historic district cases, one can conclude that the owner not only has to show that he was unable to find a reasonable use for his building, but also that he was unable to sell or lease the building. Similarly, the owner of a landmark held for charitable purposes has to prove that it was financially or physically impossible to continue its operation in the protected building. However, there are circumstances where the balance of convenience requires the granting of the demolition order. This is the case where the buildings are so decrepit that the cost of restoration outweighs any

[178] 413 NYS 2d 60 (1979) para 2.

[179] 413 NYS 2d 60 (1979) para 3.

[180] 413 NYS 2d 60 (1979) para 2.

[181] 413 NYS 2d 60 (1979) para 3.

benefits that could be derived from the preservation of the structure. In such circumstances, the denial of a demolition permit might constitute a taking of the property.

4 4 3 The Penn Central case 1978

4 4 3 1 Background

In this case, the Supreme Court had to determine whether limitations imposed by the New York Landmarks Preservation Law 1965 (the Preservation Law) on ownership caused a taking of property for which the owner had to be compensated.[182] By the time *Penn Central* was decided, numerous states and municipalities had enacted preservation laws to protect architecturally or historically significant buildings. This could be ascribed to the fact that many historic buildings and landmarks were previously demolished without considering economically viable ways to preserve these properties.[183] There was (and probably still is) a widespread belief that 'structures with special historic, cultural or architectural significance enhance the quality of life for all'.[184] The Preservation Law was adopted in 1965 for a number of reasons, including to foster 'civic pride in the beauty and noble accomplishments of the past', and to promote the use of historic landmarks and buildings for 'the education, pleasure and welfare of the people of the city'.[185]

Like other heritage preservation laws, the Preservation Law prohibits the alteration or demolition of historic buildings without a permit. The principal theme of the Preservation Law is 'to ensure the owners of any such properties both a "reasonable return" on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals'.[186]

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[182] 438 US 104 (1978) 107.

[183] 438 US 104 (1978) 108.

[184] 438 US 104 (1978) 108.

[185] 438 US 104 (1978) 109.

[186] 438 US 104 (1978) 110.

The Grand Central Terminal (the Terminal), a historic landmark and one of New York City's most famous buildings, was one of a number of properties owned by the first appellant in the area of Manhattan. This eight-story terminal was designed in the French Beaux-Arts style and was operated as a railroad station.[187] The first appellant intended to construct a multi-storey office building above the Terminal.[188] It sought the permission of the Landmarks Preservation Commission of the City of New York (the Commission) to construct the office building and submitted two building plans for approval.

The first building plan was rejected by the Commission, which explained that there was not a fixed rule prohibiting additions to landmark buildings and that 'it all depends on how they are done [but] to balance a 55-story office tower above a flamboyant Beaux Arts facade seems nothing more than an aesthetic joke'.[189] The second plan proposed partial demolition of a section of the Terminal and removing features from the building's facade. This plan was also rejected and in this regard the Commission stated that '[t]o protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off'.[190] Consequently, the appellants approached the New York Supreme Court, alleging that the Preservation Law enabled a taking of their property

[187] 438 US 104 (1978) 115.

[188] 438 US 104 (1978) 116. The first appellant concluded a fifty-year lease agreement with the second appellant (UPG Properties). It stipulated that UPG would construct a multi-storey office block on top of the Terminal. Penn Central would earn rental income of US Dollars 1 million annually during the time of construction and US Dollars 3 million annually for the subsequent years.

[189] 438 US 104 (1978) 117-118.

[190] 438 US 104 (1978) 117-118. The Commission further explained that landmarks cannot be separated from their settings, especially in instances where 'the setting is a dramatic and integral part of the original concept'. The Terminal within its setting is a 'great example of urban design' and such examples are not abundant in New York City. Landmarks must be treasured and preserved in 'a meaningful way – with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it'.

without just compensation in violation of the Fifth and Fourteenth Amendment.[191] After a series of consecutive appeals, the appellants turned to the Supreme Court for relief. The appellants did not dispute that the protection of buildings with historic, cultural and aesthetic significance was a valid governmental goal. They did not dispute that the imposition of restrictions on certain properties was a suitable way in which New York's preservations goals could be met either. The appellants further accepted the fact that their property could earn a reasonable return without additional development, and that the transferable development rights were valuable assets. Despite these factors, the appellants maintained that the Preservation Law authorised a taking of their property.[192] Specifically, they argued that the Preservation Law completely deprived them of their airspace rights since it prohibited the construction of a multi-storey office block on top of the Terminal.[193]

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[191] 438 US 104 (1978) 118-121. The appellants also argued that they had been arbitrarily deprived of their property 'without the due process of the law in violation of the Fourteenth Amendment', and they requested injunctive relief to prevent the city from interfering with any construction that could otherwise be lawfully erected on the property. The appellants also sought the payment of damages for the temporary taking of the property, which occurred from the date of designation up and until the removal of the restrictions imposed by the Preservation Law. Injunctive relief was granted, but the court severed the question of damages for a 'temporary taking'. The appellants appealed to the Appellate Division, which found that no taking had occurred, since the appellants were unable to prove that they were deprived of all beneficial use of the property. This decision was confirmed in the New York Court of Appeals, which held that the appellants had not been deprived of their property in violation of the Due Process Clause of the Fourteenth Amendment.

[192] 438 US 104 (1978) 129-130.

[193] New York City zoning laws created transferable development rights that are conferred on property owners who have not exploited their property to the full extent (height or coverage) permitted by the zoning laws. These rights can be transferred to contiguous properties that are situated on the same block. A property owner, who has acquired development rights from other owners, will be able to develop his property to an extent that he would otherwise not have been able to do. The owners of designated landmarks are afforded additional opportunities to transfer these rights to other properties. At least eight of the first appellant's own properties were suitable to receive the development rights allocated to the Terminal by virtue of its landmark status. See in this regard *Penn Central Transportation Company v City of New York* 438 US 104 (1978) 113-115.

4 4 3 2 The Supreme Court's findings

Justice Brennan, delivering the majority opinion, explained that the Supreme Court has always had difficulty in determining what exactly constitutes a taking of property. In *Armstrong v United States*[194] the Court held that:

> '[t]he Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear the public burdens which, in all *fairness and justice*, should be borne by the public as a whole'.[195] [emphasis added].

The Supreme Court explained that it had been unable to develop a specific method for determining when '"justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons'.[196] The Supreme Court added that previously, when deciding regulatory takings cases, it had confirmed that it was vital to consider the specific circumstances of the case. This amounts to an *ad hoc* factual enquiry in which several factors are relevant when deciding whether governmental action has caused a regulatory taking of property.[197] These factors are the economic impact of the

[194] 364 US 40 (1960).

[195] 364 US 40 (1960) 49.

[196] 438 US 104 (1978) 124, with reference to *Goldblatt v Hempstead* 369 US 590 (1962) 594.

[197] 438 US 104 (1978) 124.

regulation;[198] the extent to which 'the regulation has interfered with the distinct investment-backed expectations' of the owner[199] and the character of the governmental regulation.[200]

[198] Refer to Singer JW *Introduction to property* 2 ed (2005) 727-729 for a discussion of this factor. Singer explains that most regulatory actions destroy at least some value of property rights. It is difficult to ascertain when the diminution of value of a property rights is sufficiently severe to amount to a taking of property. Singer further explains that a too excessive depreciation in value of property can be compared to the government seizure of property, which will amount to a taking unless it can be justified by the public interest. The greater the reduction in value of property interests, the greater the public interest should be to justify such depreciation. Furthermore, the extent to which the property has depreciated in value depends on how the courts view property interests. For example, the court can consider the depreciation in value in light of the property as a whole or in light of specific property entitlements. If the former method is adopted, very few regulatory actions will amount to takings. By contrast, if the court follows the latter method (the sticks in the bundle approach), every form of regulatory action might constitute a taking. Singer explains that the courts are more likely to find that a taking has occurred if the regulatory action destroys most of the market value of property and if it cannot be justified by equally important public interest considerations. Furthermore, *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) has made it clear that regulatory action will amount to a taking if the owner is deprived of all economic use of the property. By contrast, it is improbable for a court to find that a taking has occurred if there is only a slight reduction in value of the property or if the regulation is designed to prohibit a use that never formed part of the owner's entitlements in the first place. Additionally, regulatory action will not amount to a taking if the regulation protects the public from harm. See also, Alexander GS 'Ten years of takings' (1996) 46 *J Legal Ed* 586-595 at 589-590.

The Supreme Court further explained that takings jurisprudence has indicated that the courts should focus on the 'character of the action and on the nature and extent of

[199] See in this regard Singer JW *Introduction to property* 2 ed (2005), who explains that a court will be more willing to find that a taking has occurred if government action affects a substantial investment made on the basis of an existing regulatory regime. This factor does not protect future investment opportunities. See to the same effect Alexander GS 'Ten years of takings' (1996) 46 *J Legal Ed* 586-595 at 589-590 and Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 71. Singer further explains that a regulation is likely to cause a taking if it interferes with vested rights, such as in the instance where a building permit is revoked after the owner has already commenced with construction. The example provided by Singer contradicts the position in South African law. See in this regard the discussion of *SA Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and another* 2007 (2) SA 461 (C) in section 4 2 above. Singer further explains that a court is likely to find that a taking has occurred if a regulatory action interferes with the present use of property. However, regulatory action will not cause a taking if the owner should have foreseen that the law would change or where the owner is prevented from benefitting from future uses of the property that he has not yet invested in.

[200] 438 US 104 (1978) 124. With reference to *United States v Causby* 328 US 256 (1946), the Supreme Court explained that it would be more ready to find that a taking had occurred where the regulation constituted a 'physical invasion by government' than where the interference was brought about by a public programme that adjusts 'the benefits and burdens of economic life to promote the common good'. In a later decision, *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982), the Supreme Court confirmed that a permanent physical invasion of property will amount to a taking for which the property owner should be compensated. Singer JW *Introduction to property* 2 ed (2005) 722-727 explains that the 'character of the government action' is the most important factor in determining whether regulatory action amounts to a taking of property. In essence, this factor requires of the court to determine whether the statutory regulation is imposed to protect individuals or members of the public, or whether it amounts to an unlawful seizure of property that cannot be taken without compensation. Singer provides a list of instances where it is more likely, or less likely, for a court to find that a taking had occurred. For example, a court is more likely to find that a taking has occurred if the regulatory action amounts to a forced, permanent physical invasion of property or where the property owner is deprived of a core property right. A court is less likely to find that a taking has occurred if, for example, legislation regulates the use of property without causing a physical invasion of property, or if the regulatory action is designed to prevent the public from suffering harm. See in this regard Singer JW *Introduction to property* 2 ed (2005) 723-724. See further Alexander GS 'Ten years of takings' (1996) 46 *J Legal Ed* 586-595 at 589-590 and Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 71-75 for a discussion of the three *Penn Central* factors.

the interference with rights in the parcel as a whole' when deciding whether a taking has taken place.[201] Takings jurisprudence does not separate property rights into segments to determine whether or not the owner had been deprived of a particular segment.[202] The appellants could therefore not argue that a taking had occurred simply because they had been deprived of development rights which they believed were available for exploitation.[203]

With reference to the character of the Preservation Law, the appellants argued that the operation of the statute had caused the value of the Terminal to diminish. Furthermore, the appellants argued that landmark owners are singled out to bear a

[201] 438 US 104 (1978) 130-131.

[202] This statement is an outright rejection of the notion of conceptual severance. The term 'conceptual severance' was coined by Radin MJ 'The liberal conception of property: cross currents in the jurisprudence of takings' (1988) 88 *Colum L Rev* 1667-1696 at 1676. Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 78-80 and 92-94 draws a distinction between temporal, spatial and functional conceptual severance. Temporal conceptual severance refers to the notion that a taking has occurred if the owner is deprived of the use of his property for a certain period of time. See for example *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency* 535 US 302 (2002), where the property owners argued that a 32-month development moratorium constituted a taking of their property. The Supreme Court rejected this argument since it ignored the principle (developed in *Penn Central*) that one has to consider the impact of the regulation on the property as a whole. Spatial conceptual severance refers to the physical division of land (or other assets) for purposes of a takings enquiry. Functional conceptual severance refers to the idea that each individual ownership entitlement is a property interest that should be protected from excessive government interference. This means that regulatory action can amount to a taking of a specific ownership entitlement for which the owner should be compensated. The implication of conceptual severance is that it broadens the scope of the takings clause. Alexander explains that case law decided after *Penn Central* has reignited the conceptual severance debate. See in this regard *Hodel v Irving* 481 US 704 (1987) and *First Evangelical Lutheran Church of Glendale v County of Los Angeles* 482 US 304 (1987). By contrast, in *Keystone Bituminous Coal Association v DeBenedictis* 480 US 470 (1978) the Supreme Court rejected the idea of conceptual severance. Alexander explains that the future of functional conceptual severance remains uncertain. The Supreme Court appears to be unwilling to fully engage with functional conceptual severance. However, it is possible that the importance of a specific ownership entitlement will be a factor that the Supreme Court will take into account in a takings enquiry.

[203] 438 US 104 (1978) 130.

burden in the public interest because their buildings did not form part of a historic district. Zoning laws and historic-district legislation imposed similar limitations and benefits on all the property owners in the area. By contrast, the Preservation Law imposed severe restrictions on individual land owners to benefit the public. Landmark owners did not benefit from similar limitations that are imposed on other owners in the area.[204] As a result, the Preservation Law enabled a taking of property.

The Supreme Court rejected this argument on the ground that the Preservation Law formed part of a comprehensive plan to protect valuable buildings in the city. About 400 landmarks and 31 historic districts have been identified under this plan. Moreover, the appellants' arguments would invalidate not only the Preservation Law but all other preservation statutes in the country.[205] The Supreme Court acknowledged that the Preservation Law did impact more severely on some land owners than on others, but that was not reason enough to find that the Preservation Law caused a taking.[206] It was further inaccurate to argue that the first appellant received no benefit from the designation of its property as a landmark. The Terminal was, at the time, one of 400 landmarks in the area and the preservation of these buildings benefitted 'all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole'.[207]

The final argument raised by the appellants was that the government had acquired the airspace above the Terminal for a governmental purpose. This contention was rejected by the Supreme Court and it explained that the Preservation Law prevented any other person from occupying the airspace above the Terminal while allowing the appellants to lucratively use the rest of the property.[208] It was also possible for the first appellant to sell its development rights to other property owners in the area. This alleviated the burden that the Preservation Law imposed on the landmark owner. As a

[204] 438 US 104 (1978) 131-132.

[205] 438 US 104 (1978) 131.

[206] 438 US 104 (1978) 133. The Supreme Court also rejected the argument that the decision to declare a property as a landmark was arbitrary, subjective and 'a matter of taste'.

[207] 438 US 104 (1978) 134.

[208] 438 US 104 (1978) 135.

result, the Supreme Court confirmed that the Preservation Law was not invalid in so far as it did not provide for compensation whenever ownership entitlements were restricted.[209]

The final question was whether the Preservation Law caused a deprivation that was so severe to justify the payment of compensation.[210] This inquiry involved an investigation into the impact of the Preservation Law on the first appellant's parcel and an evaluation of the impact of the Preservation Law on the Terminal site.[211] The Supreme Court held that the Preservation Law did not interfere with the current uses of the Terminal. It was possible for the first appellant to continue with the use of the structure as it had done for the preceding 65 years. Accordingly, the Preservation Law did not interfere with the first appellant's primary expectation with regard to the use of their land.[212] Moreover, the Preservation Law permitted the first appellant to make a profit from the Terminal and it enabled it to obtain a reasonable return on its investment.[213] The appellants were not completely deprived of the right to develop the airspace above the Terminal. Development would be permitted if it harmonises 'in scale, material and character with the Terminal'.[214] Finally, by virtue of the landmark status of the Terminal, the first appellant was the owner of valuable transferable development rights that could be transferred to at least eight of its other properties. This would mitigate the financial burden brought about by the Terminal's designation to some

[209] 438 US 104 (1978) 135.

[210] 438 US 104 (1978) 136, referring to a quotation from *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) 413.

[211] 438 US 104 (1978) 136.

[212] 438 US 104 (1978) 136.

[213] 438 US 104 (1978) 136.

[214] 438 US 104 (1978) 137.

extent. The Supreme Court accordingly held that it could not be said that the Preservation Law caused a taking of the appellants' property.[215]

In a later decision, *Lucas v South Carolina Coastal Council* (*Lucas*),[216] the Supreme Court held that there are two instances where a court can find that a taking has occurred without conducting the *ad hoc* factual enquiry prescribed by *Penn Central*.

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[215] For a thorough discussion of the *Penn Central* decision, refer to Singer JW *Introduction to property* 2 ed (2005) 687-692. See further Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 205-206. Alexander criticises the *Penn Central* judgment in three respects, namely on the grounds of its limited degree of contextuality; lack of transparency and predictability. Alexander explains that initially it seemed as if the Supreme Court would delve into a contextual analysis because it provided a detailed account of the background to the case. However, the Supreme Court's analysis was formulistic and it simply marched through the three-legged enquiry. The Supreme Court, for example, did not explain what type of harm the public would suffer if the development of *Penn Central* was allowed to continue. Furthermore, the Supreme Court did not clearly explain which values were protected by the landmark designation. The Supreme Court's decision was not transparent as it was unclear which factors influenced its decision. Furthermore, the Supreme Court failed to explain why certain factors were more important than others. For example, was the fact that Penn Central was a commercial property and not a residential property a weighty factor? Finally, Alexander explains that the Supreme Court's *ad hoc* enquiry has been criticised on the grounds that it makes it difficult to predict the outcome of a takings case. He argues that the balancing approach adopted by the Supreme Court makes takings cases predictable because this approach nearly always favours the government.

[216] 505 US 1003 (1992) 1015; 1019 and 1028-1030. Refer to Singer JW Introduction to property 2 ed (2005) 707-711 and to Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 82-83 for a discussion of *Lucas v South Carolina Coastal Council* 505 US 1003 (1992). See also Epstein RA '*Lucas v South Carolina Coastal Council*: a tangled web of expectations' (1993) 45 *Stan L Rev* 1369-1392; Epstein RA 'The seven deadly sins of takings law: the dissents in *Lucas v South Carolina Coastal Council* (1993) 26 *Loy La L Rev* 955-978; Fisher WW 'The trouble with *Lucas*' (1993) 45 *Stan L Rev* 1393-1410; Humbach JA 'Evolving thresholds and the takings clause' (1993) 18 *Colum J Envtl L*1-29; Lazarus RJ 'Putting the correct "spin" on *Lucas*' (1993) 45 *Stan L Rev* 1411-1432; Michelman FI 'Property, federalism, and jurisprudence: a comment on *Lucas* and judicial conservatism (1993) 35 *Wm & Mary L Rev* 301-328; Sax JL 'Property rights and the economy of nature: understanding *Lucas v South Carolina Coastal Council*' (1993) 45 *Stan L Rev* 1433-1455; Sax JL 'Rights that "inhere in the title itself": the impact of the *Lucas* case on western water law' (1993) 26 *Loy La L Rev* 943-954 and Underkuffler-Freund LS 'Takings and the nature of property' (1996) 9 *Can J Law & Jur* 161-205 at 194-202.

The first instance would be where there was a physical invasion of private property, as in *Loretto v Teleprompter Manhattan CATV Corp*.[217] The second instance would be where the statutory regulation of private property rights deprives the owner of all economically beneficial use of his land.[218] Both these instances amount to a categorical taking of property for which compensation should be paid.[219] The Supreme Court explained that the deprivation of all economic use of property is similar to the physical appropriation of property.[220] When an owner is deprived of all economic use of his property, it is 'less realistic' to say the 'legislature is simply "adjusting the benefits and burdens of economic life"'[221] in a way that ensures the '"average reciprocity of advantage"[222] to everyone concerned'.[223] Furthermore, it is possible that the property is being forced into a form of public service under the pretext that the regulatory action mitigates an important public harm.[224] The Supreme Court explained that in circumstances where the owner had been deprived of all economically viable use of

[217] 458 US 419 (1982). Refer to Dukeminier J, Krier JE, Alexander GS and Schill MH *Property* 6ed (2006) 961-971 for a discussion of this decision.

[218] 505 US 1003 (1992) 1015.

[219] Singer JW explains in *Introduction to property* 2 ed (2005) 692 that the Supreme Court has developed five exceptions to the rule that a court must conduct an *ad hoc* factual enquiry to determine whether regulatory action causes a taking of property. Explained differently, there are five instances where a court can find that a taking has occurred without considering the importance of the public interest that is served by the regulatory laws. These exceptions (categorical rules) are: if regulatory action amounts to a permanent physical invasion of property; if there is a deprivation of a core property right; deprivation of all economically viable use; interference with vested rights; and exactions to prohibit a certain type of development unless the owner complies with certain conditions. Singer JW *Introduction to property* 2 ed (2005) 692-721 discusses each of these categorical rules with reference to the relevant case law.

[220] 505 US 1003 (1992) 1017.

[221] *Penn Central Transportation Company v City of New York* 438 US 104 (1978) 124.

[222] *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) 415.

[223] 505 US 1003 (1992) 1018.

[224] 505 US 1003 (1992) 1018.

property, the state can only resist the payment of compensation if the proscribed use has never formed part of the owner's title.[225]

In *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency* (*Tahoe-Sierra*),[226] the Supreme Court confirmed that the principles of fairness and justice require the courts to apply the principles set forth in *Penn Central* when deciding regulatory takings cases.[227] This case concerned the constitutional validity of a 32-month development moratorium that had been placed on properties situated in the Lake Tahoe Basin.[228] The land owners (the petitioners) attempted to show that the regulatory action constituted a categorical taking for which they should be compensated. With reference to the *Lucas* case, they argued that they were deprived of all economically viable use of their land for the duration of the moratorium, which amounted to a *per se*

[225] 505 US 1003 (1992) 1027. The Supreme Court explained that one had to consider the relevant state's nuisance and property laws to determine whether there was a limitation on property rights even before the promulgation of regulatory legislation. In this regard, the Supreme Court explained that a 'limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed on ownership'.

[226] 535 US 302 (2002). Refer to Eagle SJ 'Planning moratoria and regulatory takings: the Supreme Court's fairness mandate benefits landowners' (2004) 31 *Fla St U L Rev* 429-507 at 432-441, Oshiro A '*Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*: a significant ripple in takings jurisprudence' (2004) 41 *Hous L Rev* 167-200; Singer JW *Introduction to property* 2 ed (2005) 718 and Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 88-92 for discussions of this case.

[227] 535 US 302 (2002) 342. Specifically, the court stated that '[w]e conclude, therefore, that the interest in "fairness and justice" will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than attempting to craft a new categorical rule'.

[228] 535 US 302 (2002) 306. The purpose of the moratorium was to preserve the *status quo* while the impact of development on the Lake Tahoe and surrounding environment was investigated. Studies had shown that development caused the exceptionally clear water of the lake to discolour. This could be attributed to the rain water that falls on 'impervious coverage' consisting of concrete, asphalt and buildings and which cannot be absorbed into the soil. As a result, the phosphorous and nitrogen rich water flows into the lake, which in turn enables algae to grow. The algae cause the discolouration of the water. Lake Tahoe is specifically famous for its clear blue water.

taking of their property for that period.[229] The Supreme Court found that the *Lucas* approach was limited to the exceptional circumstances where 'no productive or economically beneficial use of the land is permitted'.[230] In all other instances, where the regulation does not cause 'complete elimination of value' of the property or 'total loss' of the use of the property, the *Penn Central* analysis would apply.[231] Accordingly, when faced with a regulatory takings dispute a court must first consider the effect of the regulation on the property as a whole.[232] The court will proceed with an investigation of all the particular circumstances of the case, as prescribed in *Penn Central*, when it is found that the regulation has not caused a total taking of private property.[233]

4 4 4 Post-Penn Central case law on historic preservation

In subsequent historic preservation case law, the courts relied on *Penn Central* in support of findings that landmark preservation did not cause a taking in instances where some use of the property remained. Two cases, *900 G Street Associates v Department of Housing and Community Development* (*900 G Street Associates*)[234] and *St Bartholomew's Church v City of New York* (*St Bartholomew's Church*),[235] illustrate how the courts have applied the *Penn Central* judgment. In *900 G Street Associates* an owner sought a demolition order for a French Renaissance-style building dating back to 1867 that was listed on the National Register of Historic Places and on the District of Columbia Inventory of Historic Sites.[236] It was the property owner's intention to demolish the building to build a large office block in its place. The demolition permit was denied

[229] 535 US 302 (2002) 539.

[230] 535 US 302 (2002) 330, quoting from *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) 1017-1019.

[231] 535 US 302 (2002) 330, quoting from *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) 1019-1020.

[232] 535 US 302 (2002) 331.

[233] 535 US 302 (2002) 331.

[234] 430 A 2d 1387 (1981).

[235] 914 F 2d 348 (1990).

[236] 430 A 2d 1387 (1981) 1387.

and the owner alleged that the application of the historic preservation law resulted in a taking of his property. With reference to *Penn Central*, the court held that the protection of historic buildings and sites was a legitimate exercise of governmental power.[237] The court explained that it had to determine to what extent the diminishing in value of property caused by governmental action would constitute unreasonable economic hardship or a taking.[238] In this regard the court held that:

> '[w]e thus need only to consider in the instant case whether there is any other reasonable economic use for the building. If there is, there has been neither a constitutional taking nor any unreasonable economic hardship imposed by the decision of the Mayor's in this case.'[239]

The court held that a taking had not occurred, since the owner still had a reasonable alternative use of the property available for exploitation. The court reached this decision despite the fact that the monetary value of the property had been significantly diminished and the fact that the owner had been deprived of the most beneficial use of the property.[240] This decision is interesting because, although the court cited the *Penn Central* decision extensively, it actually applied the principle that a taking would occur if

[237] 430 A 2d 1387 (1981) 1389. The relevant heritage preservation law stipulated that a demolition permit for a historic building had to be granted where if it was in the public interest to do so or if the protection of the building caused the owner to suffer unreasonable economic hardship. The court found that this standard was akin to a taking of property without just compensation.

[238] 430 A 2d 1387 (1981) 1390.

[239] 430 A 2d 1387 (1981) 1391.

[240] 430 A 2d 1387 (1981) 1390-1391. The court referred to the decision of *Maher v City of New Orleans* 516 F 2d 1051 (5th Cir 1975), where it was decided that the fact that a owner had to apply for a demolition permit prior to demolishing a building did not mean that a taking had taken place. Likewise, the fact that a regulation causes a substantial depreciation in value of the property does not mean that a taking has occurred. As explained above, in *Maher* the denial of the demolition permit was upheld because the owner had not succeeded in proving that the sale or lease of the property was impractical or that he had no use other for the property. The court also referred to *William C Haas & Co v City and County of San Francisco* 445 US 928 (1980), where the Supreme Court held that a taking had not occurred despite the fact that the owner had been deprived of 95% of the value of his property.

the owner was deprived of all economic use of his property. This principle was also later applied in the *Lucas* decision.

In *St Bartholomew's Church*[241] the church owned two buildings that were designated as landmarks in accordance with the New York Landmarks Preservation Law 1965 (the Preservation Law).[242] The church applied for a demolition order for one of the buildings as it intended to construct a 59-storey office tower on the site.[243] Not surprisingly, the application for the demolition permit was unsuccessful and the church approached the court, asserting that the Preservation Law has placed such severe restrictions on its ability to use its property that it constituted a taking.[244] The court held that it had to apply the *Penn Central* principles to a property used for charitable purposes.[245] Central to the *Penn Central* decision was the fact that the owner still had the original use of the property available to it and that use of the property was still economically viable.[246] What had to be determined in this case was whether the Preservation Law had deprived the appellant of the original use of the property. The court found that the appellant could still use its facilities (despite the regulation) for charitable and religious activities. Admittedly, the Preservation Law caused the property to be frozen in its existing use and the appellant was prevented from expanding or altering its activities.[247] However, *Penn Central* sanctioned such consequences and the court could not find that a taking had occurred when the property owner still had the

[241] Refer to Pak T 'Free exercise, free expression, and landmarks preservation' (1991) 91 *Colum L Rev* 1813-1846 for a discussion of this decision.

[242] 914 F 2d 348 (1990) 351.

[243] 914 F 2d 348 (1990) 351.

[244] 914 F 2d 348 (1990) 356.

[245] 914 F 2d 348 (1990) 356.

[246] 914 F 2d 348 (1990) 359-360. The church was unable to show that it could not afford to repair and maintain the building.

[247] 914 F 2d 348 (1990) 356.

original use of the property available.[248] This finding was further corroborated by the fact that the church could not prove that the building was no longer suitable for its original use or that the costs of the rehabilitation and repair of the building were beyond the financial means of the church.[249]

4 4 5 Concluding remarks

One of the significant aspects of the *Penn Central* decision is the Supreme Court's finding that landmark preservation law does not only provide economic benefits but that it also improves the quality of life in urban areas.[250] *Penn Central* shows that historic preservation law is not only a legitimate but a necessary exercise of the police power. The *Tahoe-Sierra* decision confirmed that when US courts decide whether statutory regulation of property rights causes a taking of property, they must first determine whether or not the owner has been deprived of the current or original use (*Penn Central*) or of all beneficial use (*Lucas*) of the property.[251] Accordingly, a court will have to determine whether the prohibition against the demolition of a landmark building deprives the owner of the beneficial use of that property. If the denial of a demolition order does not deprive the owner of the current or original use of the property, it is unlikely that it would be regarded as a regulatory taking, even if the owner loses the opportunity to change the use of the property and, accordingly, loses a significant portion of the property's value in the process. However, if the prohibition against

[248] 914 F 2d 348 (1990) 356. The appellant attempted to show that this case differed from *Penn Central* in several respects. Firstly, the appellant argued that unlike the owners in *Penn Central* it would not have a reasonable return on its investment in the buildings. The court held that reasonable return was irrelevant where the buildings had to be used for charitable purposes. Appellant further argued that, unlike *Penn Central*, it had submitted a second plan proposing the construction of a smaller building. This argument was rejected by the court and it held that the appellant could still submit for approval more suitable additions to the Community House. Finally, the court rejected the appellant's argument that the property owners in *Penn Central* owned valuable transferable development rights and that its development rights were worthless.

[249] 914 F 2d 348 (1990) 357.

[250] 438 US 104 (1978) 134.

[251] *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

demolition deprives an owner of all economic use of his property, it will amount to categorical taking for which the owner should be compensated. The *Lucas* test places an exceptionally heavy onus on the property owner. Arguably, it would only be in rare instances that an owner will be able to prove that the denial of the demolition order has the effect of completely destroying all use which he has for the property. The court will apply the *Penn Central* logic (an ad hoc, factual balancing test), once it has established that the protection of the landmarked building has not deprived the owner of all possible uses of his land.

The *Penn Central* approach does not provide a clear-cut test for determining when the denial of a demolition order would be unconstitutional. What it does provide is a set of principles that the courts should apply when it determines whether the denial of the demolition permit constitutes a taking of property. The first principle is that US courts should conduct a context-sensitive factual enquiry when faced with a takings dispute. This means that the courts will delve into the specific circumstances of a case when they determine whether the denial of a demolition permit amounts to a taking for which the owner should be compensated. In so doing, the courts must specifically consider the economic impact that the refusal of the demolition order will have on ownership rights. The courts must also consider the extent to which the denial of the demolition permit will interfere with the investment-backed expectations of the property owner and the character of the governmental action. Finally, the courts must consider the effect of the refusal of the demolition permit in light of the property as a whole.

Penn Central shows that it would not be unconstitutional to deny a demolition order where the landmark status of a building has not deprived the owner of the original or current use of the building or the use of the building for which the property was purchased. Likewise, denial of the demolition permit will not amount to a taking if the property owner has an alternative, economic use for the property available to him. In *Penn Central*, the court found that the historic preservation law did not deprive the land owner of existing uses of the property. This in turn indicated that the landmark protection of Grand Central Station did not interfere with the owner's investment-backed expectations. In *900 G Street Associates,* the court held that the denial of the demolition order did not amount to a taking because the owner had an alternative use of the

property available to him. In similar vein, the court decided in *St Bartholomew's Church* that the landmark status of the buildings did not deprive the church of the original use of the property.

The case law discussed above indicates that the refusal of a demolition permit will not constitute a taking of property where it is still economically viable to use the property in its protected form. Economic viability can refer to current as well as future income earned from the use of the building. In *Penn Central* the US Supreme Court held that the owner of Grand Central Station could continue to use the property as it did before; it would still be able to earn a reasonable return on its investment; and it was in possession of valuable transferable rights that could be sold for a profit. These factors indicated that it was economically viable for the owners to use the property despite the decision to uphold its landmark status and to deny the development application. Economic viability within the context of *St Bartholomew's Church* meant that the church could afford to maintain and restore the landmark building.

4 5 Demolition rights within the context of German heritage preservation law

4 5 1 Introduction

The *Rheinland-Pfälzischen Denkmalschutz-und-Pflegegesetz* case[252] is the most important German historic preservation case to date. In this case, the German Federal Constitutional Court (the Constitutional Court) set out the circumstances where it would be unconstitutional to deny an owner the right to demolish a protected building. This decision should be understood in light of the interaction between Article 14.1.1 and Article 14.2 of the Basic Law for the Federal Republic of Germany 1949 (the German

[252] *BVerfGE* 100, 226 [1999]. Refer to Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 119-121 and Hofman H 'Eigentumsgarantie, Erbrecht und Enteignung' in Schmidt-Bleibtreu B and Klein F et al (eds) *Schmidt-Bleibtreu, Hofman, Hopfauf Grundgesetz: Kommentar* 11 ed (2008) Rdn 41 for a discussion of the case. See also Du Plessis E 'To what extent may the state regulate private property for environmental purposes? A comparative study' 2011 *TSAR* 512-526 at 520.

Basic Law),[253] and the principle of proportionality as applied in German constitutional law.

Article 14 of the German Basic Law,[254] the property clause, is subdivided into three separate clauses.[255] Van der Walt explains that Article 14.1.1 contains the guarantee clause and Article 14.2 (read with Article 14.1.2) contains the regulation clause. Article 14.3 is the expropriation clause of the German Basic Law.[256] Article 14.1.1 carries a positive formulation as it provides that '[p]roperty and the right of inheritance shall be guaranteed'.[257] Van der Walt explains that is unusual for a constitutional property clause to be formulated in a positive manner and extensive theory has been developed in German law to delineate the exact meaning of this provision.[258] It is generally accepted that the purpose of Article 14.1.1 is not primarily to guarantee property but to protect the

[253] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 122. Van der Walt explains that the correct translation for *Grundgesetz* (*GG*) is Basic Law and not 'Constitution'. The term German Basic Law is used throughout this discussion.

[254] An official translation of the German Basic Law can be found at http://www.gesetze-im-internet.de/englisch_gg/index.html (accessed on 10-10-2011).

[255] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 122. For the purpose of discussion Van der Walt numbers the individual sentences of the three clauses for example 14.1.1 or 14.1.2. This method is employed whenever it is necessary to refer to a specific sentence of one of the three clauses. Van der Walt explains that Article 14 should be interpreted with reference to the 'fundamental purpose' of the property guarantee as explained by the German Federal Constitutional Court. This fundamental purpose is set out at the beginning of all the important decisions on Article 14, and it states that 'the property guarantee (a) is a fundamental (human) right, (b) which is meant to secure, for the holder of property, (c) an area of personal liberty (d) in the patrimonial sphere, (e) to enable her to take responsibility for the free development and organization of her own life (f) within the larger social context'. Van der Walt further explains that the fundamental purpose should be understood in light of the fact that human dignity has a special place in the German Bill of Rights. The right to human dignity influences all interpretations of Article 14. See Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 124.

[256] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 123.

[257] Refer to http://www.gesetze-im-internet.de/englisch_gg/index.html (accessed on 10-10-2011) for an official translation of the German Basic Law.

[258] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 124.

liberty and autonomy of the individual.[259] This guarantee is designed to enable the individual to participate in social, political and economic structures.[260] Van der Walt reasons that Article 14.1.1 is also the starting point for explaining 'socially-orientated limitations on private property'.[261] Viewed from this perspective, it is clear that the Article 14 property guarantee allows for, but also confines, the regulation of property, insofar as it lays down requirements for statutory and regulatory actions that define the content of property rights and that limit existing property rights.[262]

The property guarantee consists of two separate guarantees, namely the individual guarantee (*Bestandsgarantie* or the *Individualgarantie*)[263] and the institutional guarantee (*Institutionsgarantie*).[264] The individual guarantee is associated with the negative aspects of the property guarantee in Article 14.3. Essentially, it recognises that the state can regulate property rights, provided that it complies with certain requirements. More specifically, the state may interfere with property rights by way of regulation or expropriation, if it meets the necessary requirements, and provided it is done for a public purpose that trumps the individual guarantee.[265] The institutional guarantee is linked to the positive part of the property clause in Article 14.1.1, and it

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[259] Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 1 and Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 126.

[260] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 127.

[261] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 127.

[262] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 128. Jarass HD 'Eigentumsgarantie und Erbrecht' in Jarass HD and Pieroth B (eds) *Jarass/Pieroth Grundegesetz für die Bundesrepublik Deutschland: Kommentar* 8 ed (2006) Rdn 1 explains that the purpose of the property guarantee is to protect property interests so that the individual can participate in economic and social structures and, as a result, take responsibility for her own life.

[263] Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 8.

[264] Refer to Jarass HD 'Eigentumsgarantie und Erbrecht' in Jarass HD and Pieroth B (eds) *Jarass/Pieroth Grundegesetz für die Bundesrepublik Deutschland: Kommentar* 8 ed (2006) Rdn 4 and to Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 11 for an explanation of the practical relevance of the institutional guarantee.

[265] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 128.

relates to the entire institution of private property. Van der Walt explains that this guarantee 'secures a core of legal norms, which describes the essence of property (its existence, availability and usefulness for private property holders) and it ensures that this core is not abolished or eroded by legislation'.[266] For example, the institutional guarantee prevents the state from removing entire categories of property from the sphere of private ownership without sufficient justification.[267] The institutional guarantee prevents the state from diminishing the 'sphere of personal liberty' guaranteed by article 14.[268]

Article 14.1.1 is qualified by Article 14.1.2, which stipulates that the content (*Inhalt*) and limits (*Schranken*) of private property rights shall be determined by law.[269] Article 14.1.2 recognises that property rights can be subjected to the restrictions created by the statutory regulation of the use of property. Van der Walt explains that Article 14.1.1, read with Article 14.1.2, places an obligation on the legislature to create a property regime that strikes an equitable balance between the individual's interest in private property and the public interest in the regulation of private property rights.[270] Article 14 not only places a duty on the legislature to maintain an equitable property system through the regulation of private property rights, but it also prohibits the excessive

[266] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 129.

[267] Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53ed (2008) Rdn 11 and Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 129.

[268] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 130.

[269] See in this regard Jarass HD 'Eigentumsgarantie und Erbrecht' in Jarass HD and Pieroth B (eds) *Jarass/Pieroth Grundegesetz für die Bundesrepublik Deutschland: Kommentar* 8 ed (2006) Rdn 35; Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 27 and 305 and Hofman H 'Eigentumsgarantie, Erbrecht und Enteignung' in Schmidt-Bleibtreu B and Klein F et al (eds) *Schmidt-Bleibtreu, Hofman, Hopfauf Grundgesetz: Kommentar* 11 ed (2008) Rdn 36.

[270] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 132. See to the same effect Bryde B 'Art. 14 Eigentum und Erbrecht' in Von Münch I and Kunig P (eds) *Von Münch/Kunig Grundgesetz Kommentar* Band I 5 ed (2000) Rdn 59.

statutory regulation of private property rights (*Übermaßverbot*).[271] Accordingly, the regulation of property entails the determination of the content and the limits of property rights within the framework of Article 14.[272] The legislature must uphold the institutional guarantee when determining the content of property rights.[273] As explained above, this means that the legislature must establish new property institutions if required and refrain from removing existing property institutions from the social and economic sphere, unless it is absolutely necessary.[274] The legislature must adhere to the individual property guarantee when determining the limits of property rights.[275] This means that the limits of property must be delineated, but that the legislature must also give effect to its constitutional duty to preserve existing individual property rights.[276] The proportionality principle also limits the legislature's power to regulate private property rights. This principle requires of the legislature to strike a balance between private property rights and the public interest in the regulation or limitation of private property rights.[277] A regulation will be invalid if it imposes disproportionate burdens on the owner

[271] Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 315 and Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 132. See to the same effect Van der Walt AJ 'Compensation for excessive or unfair regulation: a comparative overview of constitutional practice relating to regulatory takings (1999) 14 *SAPL* 273-331 at 286 and Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 135.

[272] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 132. See to the same effect Van der Walt AJ 'Compensation for excessive or unfair regulation: a comparative overview of constitutional practice relating to regulatory takings (1999) 14 *SAPL* 273-331 at 286.

[273] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 133.

[274] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 133.

[275] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 133.

[276] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 133.

[277] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 133. See to the same effect Van der Walt AJ 'Compensation for excessive or unfair regulation: a comparative overview of constitutional practice relating to regulatory takings (1999) 14 *SAPL* 273-331 at 287.

and in so doing disturbs the equitable balance between the public interest and the interests of the individual property owner.[278]

Article 14.1.2 should be read together with Article 14.2 of the German Basic Law, which stipulates that: '[p]roperty entails obligations. Its use should also serve the public interest'.[279] This clause confirms that property has an underlying social function and that property rights can be limited in the public interest.[280] Van der Walt explains that this social limitation originates from the constitutional property guarantee, which requires a balance to be struck between private property rights and the social or public interest in

[278] Van der Walt AJ 'Compensation for excessive or unfair regulation: a comparative overview of constitutional practice relating to regulatory takings (1999) 14 *SAPL* 273-331 at 287-288. See to the same effect Du Plessis E 'To what extent may the state regulate private property for environmental purposes? A comparative study' 2011 *TSAR* 512-526 at 520.

[279] Refer to http://www.gesetze-im-internet.de/englisch_gg/index.html (accessed on 10-10-2011) for an official translation of the German Basic Law. See to the same effect Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 422, who explains that historic preservation and environmental conservation laws fulfil a particularly important function in German society, and that the uncompensated limitations imposed on ownership in terms of these laws are justified in light of Article 14.1.2 of the German Basic Law. These laws are constitutional, provided that they are reconcilable with the proportionality principle. The ownership of, for example, a historic building, is accompanied by certain social responsibilities (*Sozialpflichtikeit*). Uncompensated limitations on the owner's rights in relation to his historic building will be permissible, provided that there are still economically viable uses of the property available to the owner. However, the historic preservation law will be unconstitutional if it imposes disproportionate burdens on the owner.

[280] Jarass HD 'Eigentumsgarantie und Erbrecht' in Jarass HD and Pieroth B (eds) *Jarass/Pieroth Grundegesetz für die Bundesrepublik Deutschland: Kommentar* 8 ed (2006) Rdn 35 explains that Art 14.2 instructs the legislature to regulate property in the public interest. This duty becomes even more important in instances where the public has a particularly strong interest in the regulation of a specific form of property. Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdnn 306 and 308 explains that Article 14.1.2 and Article 14.2 confirms that property must be regulated in the public interest. Importantly, the limitations imposed on ownership in the public interest are not without boundaries. Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 133-135 argues that this provision expressly incorporates a social-obligation norm into the German legal system. Chapter 6 applies Alexander's social obligation norm theory to explain why certain limitations are imposed on ownership in the context of illegal buildings, historic preservation and unlawfully occupied buildings.

the use of the property.[281] Furthermore, this balance must be maintained in light of the proportionality principle, which serves as a safeguard against the excessive regulation of property rights.[282] Van der Walt is of the view that the principle of proportionality ensures that a regulation 'starts with but also ends with the public interest and that it respects and protects both the public interest and the individual interests equally'.[283] The operation of the proportionality principle and the prohibition against regulatory excess is best illustrated by the grading approach (the principle of *Abstufung der Sozialpflichtigkeit*) adopted in German law. This approach requires of the courts to draw a distinction between property that provides 'security for the personal liberty of its holder' and property that is held for other, less personal purposes such as commercial property.[284] German law protects property rights more fiercely when it is owned to ensure personal autonomy and liberty.[285] This means that if property provides security and liberty to its holder, the statutory limitations imposed on that property will be less

[281] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 133. See to the same effect Bryde B 'Art. 14 Eigentum und Erbrecht' in Von Münch I and Kunig P (eds) *Von Münch/Kunig Grundgesetz Kommentar* Band I 5 ed (2000) Rdnn 61-62.

[282] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 133.

[283] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 135. See to the same effect Hofman H 'Eigentumsgarantie, Erbrecht und Enteignung' in Schmidt-Bleibtreu B and Klein F et al (eds) *Schmidt-Bleibtreu, Hofman, Hopfauf Grundgesetz: Kommentar* 11 ed (2008) Rdn 38. Jarass HD 'Eigentumsgarantie und Erbrecht' in Jarass HD and Pieroth B (eds) *Jarass/Pieroth Grundegesetz für die Bundesrepublik Deutschland: Kommentar* 8 ed (2006) Rdnn 38a-39 explains that a regulatory measure will be proportional if it meets three requirements. These requirements are, firstly, that the regulation must be strictly necessary; secondly, the regulation must be suited to the purpose for which it was enacted and, finally, the regulation must not impose burdens that are disproportionate to the benefits created by the regulation. Furthermore, a regulation must be generally constitutional, which means that it cannot be in conflict with other constitutional provisions such as the equality clause. See to the same effect Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 135 and Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 134.

[284] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 135.

[285] Jarass HD 'Eigentumsgarantie und Erbrecht' in Jarass HD and Pieroth B (eds) *Jarass/Pieroth Grundegesetz für die Bundesrepublik Deutschland: Kommentar* 8 ed (2006) Rdn 43. See also Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 135-136.

severe.[286] For example, a person's home is protected more strictly and less interference into these property rights is tolerated. By contrast, property held for reasons other than personal security and liberty will be subjected to more vigorous regulations with more far-reaching consequences.[287] Van der Walt explains that this approach results in the situation where certain properties are subjected to particularly strict and far-reaching regulations because the public interest in regulating that property outweighs the individual interest in not having the property regulated.[288] For instance, land is a scarce and valuable resource, and for that reason it is subjected to stricter statutory regulations.[289]

4 5 2 The Rheinland-Pfälzisches Denkmalschutz- und -Pflegegesetz case 1999

4 5 2 1 Background

The Rheinland-Pfälzisches Denkmalschutz- und Pflegegesetz (the Act) provides for the protection, restoration and maintenance of historic buildings and objects. Like its South African and American counterparts, the Act limits the owner's right to demolish or alter a protected building. The Act stipulates that a protected building can only be demolished or altered with the consent of the relevant official or board, and changes to such a building can only be done in accordance with prescribed standards. Permission to demolish a historic building is only granted if the demolition is in the public interest. The Act does not compel the decision-maker to take the individual property owner's interests into account when deciding whether a demolition permit should be issued.[290]

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[286] Bryde B 'Art. 14 Eigentum und Erbrecht' in Von Münch I and Kunig P (eds) *Von Münch/Kunig Grundgesetz Kommentar* Band I 5 ed (2000) Rdn 59.

[287] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 135-136. See to the same effect Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 135-136.

[288] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 135-136. See to the same effect Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 135-136.

[289] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 136.

[290] *BVerfGE* 100, 226 [1999] 2.

Three protection measures are put in place to protect owners who are unable to efficiently use their properties while adhering to the limitations imposed by the Act. Firstly, property can be expropriated in instances where it cannot be protected in any other reasonable manner. Secondly, a property owner must be compensated in instances where he uses his property in accordance with preservation requirements and where, as a result, his economic uses of his property are drastically diminished. Finally, compensation must be paid where the application of the Act has the effect of an expropriation.[291]

The property central to this dispute was a 950 square meter palatial villa (the Villa) built in the nineteenth century in the vicinity of an industrial business area.[292] Initially, the building was used as a house for the director of a business (*Direktorenwohnhaus*) and later as a family residence.[293] The Villa stood vacant since 1981 as it was no longer suitable to be used as a home. In 1981 the Villa's owner (the plaintiff) applied to the preservation authority for permission to demolish the building in accordance with paragraph 13 of the Act. It was evident that the plaintiff did not have any economic use for the building.[294] For years she unsuccessfully tried to find an alternative use for the building or a lessee who would have a use for the Villa. The plaintiff also offered the free use of the Villa to the local district, who could utilise it as a museum, on condition that the district should bear the cost of maintaining the building.[295] This offer was turned down as it was estimated that restoration costs would exceed 1 million German Marks. It was also estimated that the annual maintenance costs of the Villa would amount to

[291] *BVerfGE* 100, 226 [1999] 3.

[292] For a discussion of this case refer to Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 352-353 and Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 119-121. See further Du Plessis E 'To what extent may the state regulate private property for environmental purposes? A comparative study' 2011 *TSAR* 512-526 at 523.

[293] *BVerfGE* 100, 226 [1999] paras 43-44.

[294] *BVerfGE* 100, 226 [1999] para 46.

[295] *BVerfGE* 100, 226 [1999] para 46.

300 000 German Marks. It was clear that the plaintiff spent a disproportionate amount of energy and money on the maintenance of the Villa.[296]

The application for a demolition permit was turned down by the preservation authority despite the plaintiff's contention that it was unreasonable to expect her to maintain a vacant and useless building.[297] In 1983 the Villa was placed under formal protection and subsequent appeals (against the denial of a demolition permit) to the Administrative Court (*Verwaltungsgericht*) and Higher Administrative Court (*Oberverwaltungsgericht*) proved unsuccessful.[298] Both courts confirmed the historic and cultural value of the Villa. The Higher Administrative Court held that it was only necessary to consider the historic value and characteristics of the building when deciding whether a building should be placed under formal protection. Other factors, such as the property owner's financial position or more economic uses of the property, had not been taken into account.[299] As to the demolition permit, the court held that it was not in the public's interest to demolish the Villa. The court reached its decision even though it had not taken into account the owner had no economic use for the property, or the fact that the maintenance and restoration costs were excessive.[300]

The Administrative Court held that the private interests of the property owner were irrelevant to the question of whether a demolition permit should be granted. It directed the appellant to draft a use-and-renovation plan (*Nutzungs-und Sanierungskonzept*) for the Villa, which would be funded by the preservation authorities once it had been approved.[301] The Administrative Court was of the view that the burden of paying the renovation and maintenance costs would not be as strenuous as alleged by the appellant, since it would be paid over a long period of time.[302] It is against this

[296] *BVerfGE* 100, 226 [1999] para 46.

[297] *BVerfGE* 100, 226 [1999] para 47.

[298] *BVerfGE* 100, 226 [1999] para 48.

[299] *BVerfGE* 100, 226 [1999] para 49.

[300] *BVerfGE* 100, 226 [1999] para 50.

[301] *BVerfGE* 100, 226 [1999] para 51.

[302] *BVerfGE* 100, 226 [1999] para 51.

background that the plaintiff proceeded to challenge the constitutional validity of paragraph 13 of the Act in the Federal Constitutional Court.

4 5 2 2 The finding of the Federal Constitutional Court

The plaintiff argued that paragraph 13 of the Act was unconstitutional as it did not oblige the preservation authority to consider the interests of property owners when deciding whether a demolition permit should be granted.[303] The Federal Constitutional Court first considered the questions of jurisdiction and ripeness and held that this case raised a constitutional issue.[304] It then addressed the issue of whether paragraph 13 had to be tested against Article 14.1 (the deprivation clause) or Article 14.3 (the expropriation clause) of the German Basic Law. The court held that paragraph 13 (and the Act in general) set out to determine the restrictions that could be imposed on ownership.[305] The fact that the owner's application for a demolition permit had been turned down did not mean that an expropriation had taken place. Accordingly, this case raised issues concerning the validity of the statutory regulation of private property, which had to be tested against Article 14.1 of the German Basic Law.[306]

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[303] *BVerfGE* 100, 226 [1999] para 54. Refer to Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdnn 352-353 for an analysis of the Court's decision.

[304] *BVerfGE* 100, 226 [1999] para 77.

[305] *BVerfGE* 100, 226 [1999] para 79. See in this regard Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 119.

[306] *BVerfGE* 100, 226 [1999] par 81; see Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 147. The Federal Constitutional Court drew a distinction between what in South African law would be a deprivation and the expropriation of property. In instances of expropriation the state takes physical possession of a part or the whole of the property to be used for a specific public purpose. Van der Walt explains that Art 14.3 of the Basic Law, the expropriation clause, allows two types of expropriation, namely an expropriation authorised in terms of legislation and an administrative expropriation. The court decided that the appellant had not been expropriated of her property. The extent to which property rights are interfered with is irrelevant when deciding whether a person had been deprived of his property. Furthermore, regulatory action remains a deprivation of property even in instances where the effect of the regulation is similar to an expropriation of property.

The court explained that it expected of the legislator to maintain a balance between the protection-worthy interests of the property owner and the public interest in the regulation of property when it determined the content and limitations of ownership.[307] It must also uphold other constitutional principles such as the principles of equality and proportionality. Private property was regulated in the public interest, but the extent to which burdens can be imposed on ownership must be limited. The limitations imposed on ownership may not go beyond the purpose for which the regulation was enacted.[308] Property fundamental to a person's dignity and, which promoted his personal autonomy would be protected more fiercely than property that was merely held for commercial purposes.[309] A regulation would be invalid and unconstitutional when the legislator overstepped the boundaries created by this framework when determining the content and limitations of ownership. Payment of compensation in such an instance would not render the regulation constitutional and valid.[310]

Turning to the validity of paragraph 13, the court held that, unlike similar pieces of legislation, the Act did not compel the preservation authority to consider the interests of the owner when making decisions concerning historic buildings in private ownership. This imposed disproportionate burdens on the owner.[311] The court confirmed that the protection of historic and culturally valuable buildings was a legitimate goal that would generally fall within the scope of Article 14.2 of the German Basic Law.[312] Moreover, the consent-based procedure adopted by the Act was deemed a suitable and necessary

[307] *BVerfGE* 100, 226 [1999] para 83.

[308] *BVerfGE* 100, 226 [1999] para 83.

[309] *BVerfGE* 100, 226 [1999] para 84.

[310] *BVerfGE* 100, 226 [1999] para 85. Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 120 explains that the limitation could not be treated as a 'compensable expropriation' because the legislature did not have the intention to remove the asset from private ownership. Rather, this limitation on ownership amounted to an excessive regulation, which was invalid.

[311] *BVerfGE* 100, 226 [1999] para 87.

[312] *BVerfGE* 100, 226 [1999] para 88. See to the same effect Jarass HD 'Eigentumsgarantie und Erbrecht' in Jarass HD and Pieroth B (eds) *Jarass/Pieroth Grundegesetz für die Bundesrepublik Deutschland: Kommentar* 8 ed (2006) Rdn 62a.

method to protect valuable buildings.[313] In this regard, the court explained that it could not think of another method that would deliver similar results, but with lesser burdens on ownership. In most cases the application of the Act would not impose disproportionate and unreasonable burdens on property owners.[314]

The court decided that generally the prohibition against the demolition of a valuable building would not deprive an owner of the existing use of the property.[315] In light of Article 14.2.2 of the German Basic Law and the purpose of the legislation, property owners should accept that they would not always have the most beneficial use of their property available for exploitation.[316] However, the situation could arise where the operation of regulatory legislation caused an individual owner to be deprived of all beneficial use of his property.[317] A regulation could also cause existing uses of the property to become impractical. The court explained that a property owner would bear a disproportionate burden in the public interest if historic preservation laws had the effect of depriving him of all reasonable uses of his property, including the possibility of selling the property.[318] In such instances, the legal position of the owner would be transformed into something that could no longer be called ownership and, under these

[313] *BVerfGE* 100, 226 [1999] para 89.

[314] *BVerfGE* 100, 226 [1999] para 90. See to the same effect Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 352.

[315] *BVerfGE* 100, 226 [1999] para 91.

[316] *BVerfGE* 100, 226 [1999] para 91.

[317] *BVerfGE* 100, 226 [1999] para 92.

[318] *BVerfGE* 100, 226 [1999] para 92. See to the same effect Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 352.

circumstances; it would be reasonable and justifiable to grant a demolition permit.[319] If the public interest still required the protection of the valuable building, the state would have to expropriate the property.[320] Accordingly, the court held that paragraph 13 of the Act was unconstitutional insofar as it did not avoid the imposition of disproportionate burdens on the property owners, and in that it did not prescribe methods to remedy instances where owners were disproportionately burdened.[321]

The court explained that the compensation provision (paragraph 31) of the Act did not remedy the disproportionate burden brought about by the prohibition to demolish the

[319] In 1 *BvR* 2140/08 [2010] paras 4; 20; 21 and 25, the court confirmed the decision reached in *BVerfGE* 100, 226 [1999]. The court specifically held that a disproportionate burden would be imposed on property owners where the operation of historic preservation legislation caused the owner to be deprived of the right to use or sell his property, and where the owner had the concomitant financial burden of maintaining and restoring an historic building. In this case the court found that a disproportionate burden had not been imposed on the owner despite the fact that he was denied the right to demolish a chapel situated on his property. The reason for this was that the plaintiff had received a part of the property, which had been declared a protected area in terms of the provisions of the same Act discussed above. Subdivision only occurred after the property had been placed under formal protection. The court held that to determine whether the Act imposed disproportionate burdens on the owner, it had to consider the entire protected area, and not only the piece of land on which the chapel stood. Stated differently, the court had to determine whether it would have been reasonable to expect of the owner to preserve the chapel before the subdivision of the land. The court decided that before subdivision it would have been proportionate, and reasonable, to allow the protection of the chapel. Therefore, the owner could not argue that it was unreasonable to deny a demolition permit because of the effects of the subdivision. The court held that Art 14.1 did not protect the private use of property that had been severed from a larger and economically viable parcel of land. Refer to Du Plessis E 'To what extent may the state regulate private property for environmental purposes? A comparative study' 2011 *TSAR* 512-526 for a discussion of this decision.

[320] *BVerfGE* 100, 226 [1999] para 92.

[321] *BVerfGE* 100, 226 [1999] para 93. See to the same effect Jarass HD 'Eigentumsgarantie und Erbrecht' in Jarass HD and Pieroth B (eds) *Jarass/Pieroth Grundegesetz für die Bundesrepublik Deutschland: Kommentar* 8 ed (2006) Rdn 62a and, Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 426.

Villa.[322] It was within the legislature's power to incorporate an equalisation provision (*Ausgleich*)[323] in a historic preservation statute[324] to prevent that law from imposing disproportionate burdens on land owners. However, paragraph 31 could not fulfil this function as it was formulated too vaguely. The court explained that a legislative provision that unreasonably limited ownership and that was linked to an equalisation measure could only be reconciled with Article 14.1 of the German Basic Law in exceptional circumstances.[325] The court further explained that the legislature did have the power to enforce provisions which would have extremely unreasonable effects, provided it had created equalisation measures clearly designed to prevent the

[322] Bryde B 'Art. 14 Eigentum und Erbrecht' in Von Münch I and Kunig P (eds) *Von Münch/Kunig Grundgesetz Kommentar* Band I 5 ed (2000) Rdn 100a explains that the general compensation provision could not qualify as an equalisation measure. Moreover, Article 14.1.1 of the German Basic Law requires of the legislature to, firstly, avoid the imposition of disproportionate burdens on property owners. Secondly, a court may only order the payment of an equalisation sum if it is provided for in the act and if it will alleviate the otherwise excessive burden that is imposed on the owner. See to the same effect Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 352

[323] Refer to Bryde B 'Art. 14 Eigentum und Erbrecht' in Von Münch I and Kunig P (eds) *Von Münch/Kunig Grundgesetz Kommentar* Band I 5 ed (2000) Rdn 100a for a general explanation of the nature and function of equalisation measures.

[324] Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 143 and 150 and to the same effect Van der Walt AJ *Constitutional property law* 3 ed (2011) 366-367. Van der Walt translates *Ausgleich* into 'equalisation payments'. He explains that this is not compensation for the expropriation of property or delictual damages, but a (civil law) payment of money to lessen the burden imposed on ownership rights by the legitimate regulation of property. In essence, the equalisation payment alleviates the burden imposed by the statutory regulation of property and in so doing it prevents such regulation from being rendered unconstitutional and invalid. See further Van der Walt AJ 'Compensation for excessive or unfair regulation: a comparative overview of constitutional practice relating to regulatory takings (1999) 14 *SAPL* 273-331 at 288-290; Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 42-47; Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 120-121 and Hofman H 'Eigentumsgarantie, Erbrecht und Enteignung' in Schmidt-Bleibtreu B and Klein F et al (eds) *Schmidt-Bleibtreu, Hofman, Hopfauf Grundgesetz: Kommentar* 11 ed (2008) Rdn 40.

[325] *BVerfGE* 100, 226 [1999] para 95.

imposition of disproportionate and unequal burdens on property owners in the specific instance.[326]

The court stressed that an equalisation provision was not a general method of bringing disproportionate limitations on ownership in line with Article 14.1 of the German Basic Law. Regulatory provisions should protect the essence of ownership and uphold the principle of equality, even in instances where the legislation did not include equalisation provisions.[327] Equalisation provisions should be specifically designed to prevent disproportionate and unreasonable effects through administrative, technical or financial means.[328] Furthermore, equalisation measures should meet certain requirements to be in line with Article 14.1 of the German Basic Law. Specifically, equalisation measures should be expressly provided for in the Act, and the circumstances in which it would find application must be specified.[329] Compensation could not be paid as an equalisation measure where a legislative provision imposed disproportionate and unreasonable burdens on a property owner.[330] In such instances, ownership should be protected in another manner, such as the granting of a demolition order. Article 14.1.1 requires of the legislature to avoid imposing disproportionate

[326] *BVerfGE* 100, 226 [1999] para 96. See to the same effect Bryde B 'Art. 14 Eigentum und Erbrecht' in Von Münch I and Kunig P (eds) *Von Münch/Kunig Grundgesetz Kommentar* Band I 5 ed (2000) Rdnn 65-66; Jarass HD 'Eigentumsgarantie und Erbrecht' in Jarass HD and Pieroth B (eds) *Jarass/Pieroth Grundegesetz für die Bundesrepublik Deutschland: Kommentar* 8 ed (2006) Rdnn 40 and 46 and Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdnn 344-345.

[327] *BVerfGE* 100, 226 [1999] para 97.

[328] *BVerfGE* 100, 226 [1999] para 98. Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdn 346 explains that a general compensation provision will not be considered an equalisation measure. This means that a general compensation provision in the authorising legislation will not prevent a court from declaring the act unconstitutional insofar as it imposes a disproportionate burden on the property owner.

[329] *BVerfGE* 100, 226 [1999] para 100. See in this regard Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 120.

[330] *BVerfGE* 100, 226 [1999] para 101. See to the same effect Hofman H 'Eigentumsgarantie, Erbrecht und Enteignung' in Schmidt-Bleibtreu B and Klein F et al (eds) *Schmidt-Bleibtreu, Hofman, Hopfauf Grundgesetz: Kommentar* 11 ed (2008) Rdn 41.

burdens on property owners and ownership entitlements have to be preserved as far as possible.[331] The court further explained that the legislator had to make provision for the granting of a demolition order where, as in this case, the operation of the Act resulted in extreme hardship and where an equalisation measure had not specifically been designed to avoid disproportionate consequences.[332] Moreover, the payment of compensation could not serve as an alternative to a demolition order.[333] The court concluded that the Act imposed a disproportionate burden on the property owner insofar as it deprived him of the right to demolish a building that was too expensive to maintain and for which he had no economically viable use. There was no equalisation measure that alleviated the burden imposed on the owner. Accordingly, he was entitled to a demolition permit. The court directed the owner to challenge the administrator's decision to refuse a demolition permit in the Administrative Court.[334]

4 5 3 Concluding remarks

In this case the Federal Constitutional Court confirmed that in Germany the protection of historic buildings and objects is a permissible legislative goal. The consent-based procedure usually adopted in historic preservation legislation is a practical method to ensure the protection of historic buildings. Generally, the operation of historic preservation legislation such as the Act will not cause unconstitutional and disproportionate results. The prohibition against the demolition of a protected building does not deprive the owner of the use of the property and a property owner must accept

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[331] *BVerfGE* 100, 226 [1999] para 101; Papier J 'Art. 14' in Maunz T and Dürig G et al (eds) *Maunz-Dürig Grundgesetz: Kommentar* Band II 53 ed (2008) Rdnn 348 and 352 and Hofman H 'Eigentumsgarantie, Erbrecht und Enteignung' in Schmidt-Bleibtreu B and Klein F et al (eds) *Schmidt-Bleibtreu, Hofman, Hopfauf Grundgesetz: Kommentar* 11 ed (2008) Rdn 41. See also Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 120.

[332] See in this regard the discussion in Hofman H 'Eigentumsgarantie, Erbrecht und Enteignung' in Schmidt-Bleibtreu B and Klein F et al (eds) *Schmidt-Bleibtreu, Hofman, Hopfauf Grundgesetz: Kommentar* 11 ed (2008) Rdn 41.

[333] *BVerfGE* 100, 226 [1999] para 98.

[334] *BVerfGE* 100, 226 [1999] para 103.

that he will not always be able to use the property in the most economically beneficial way. However, there will be circumstances where it would be unconstitutional to deny a property owner a demolition permit for a protected building. This would be where the statutory protection of a building causes an owner to be deprived of all beneficial uses of the building or where other uses of the building become impractical. The protection of property will also deprive the owner of the opportunity to sell or to lease the building. The historic preservation legislation must allow the demolition of historic buildings where the protection of the building imposes disproportionate and unreasonable burdens on the owner. In such instances, the expropriation of the historic building is the only alternative to demolition. In the absence of expropriation, payment of compensation cannot take the place of a demolition permit where the protection of the building has caused the owner to be deprived of all uses of the building. Equalisation payment (*Ausgleich*) is a useful tool to prevent the imposition of disproportionate burdens on property owners, but equalisation measures must be specifically crafted to prevent the situation where the protection of a building causes unreasonable and disproportionate interferences with ownership entitlements.

An important aspect of the case is the distinction drawn between property held for personal autonomy and liberty and property held for other reasons such as commercial property. It is evident that where a historic building is, for example, a home that the limitations imposed on ownership by historic preservation laws will be scrutinised more closely. This means that a court is more likely to find that the prohibition against demolition is disproportional when a historic preservation law compels an owner to maintain a structure that he can no longer use as a home and which cannot be sold. By contrast, when property is held for commercial reasons, more compelling reasons will have to support a finding that historic preservation laws imposes a disproportionate burden on the owner.

4 6 Conclusions

It is clear that in all three jurisdictions historic preservation laws are deemed to be a valid and necessary exercise of the state's police power since 'structures with special

historic, cultural or architectural significance enhance the quality of life for all'.[335] Even before *Penn Central Transportation Company v City of New York* (*Penn Central*)[336] the American courts acknowledged that historic preservation laws fell within the scope of the states police power.[337] The *Penn Central* decision expelled any uncertainty that might still have existed in relation to the general constitutional validity of heritage preservation laws. Similarly, in German law, a regulatory measure will be valid as long as it complies with the proportionality principle. This means that when drafting legislation the legislature must maintain a balance between the property owner's rights and the public interest. The regulatory measure should not impose burdens beyond what the public interest requires. In Germany, a heritage preservation law will be valid as long as it is strictly necessary, suited to the purpose it serves and it does not impose burdens that outweigh the benefits obtained through that legislation. The Rheinland-Pfälzisches Denkmalschutz- und Pflegegesetz (the Act) was declared invalid insofar as it did not maintain the fragile balance between the public's interest in historic preservation, ownership entitlements and the burdens that are imposed on the owner. The South African courts have also established that heritage or historic preservation is a legitimate exercise of the state's police power as they confirmed that the National Heritage Resources Act 25 of 1999 (the Heritage Resources Act) provides the framework within which ownership should now function.[338]

Historic preservation laws limit an owner's right to demolish historic buildings by requiring him to apply for a demolition permit, even in circumstances where he may have no viable use for the property and where the upkeep of a historical landmark may be extremely costly. These laws can also impose a positive duty on the owner to maintain a protected building in the public interest. In *Penn Central*[339] the US Supreme Court explained that the fact that the demolition permit has been denied does not necessarily mean that the owner's rights had been taken for a public use for which he

[335] *Penn Central Transportation Company v City of New York* 438 US 104 (1978) 108.

[336] 438 US 104 (1978).

[337] *Maher v the City of New Orleans* 516 F 2d 1051 (1975).

[338] *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) 37.

[339] 438 US 104 (1978).

should be compensated. Likewise, the German Federal Constitutional Court confirmed that the permit-based system was the most efficient way in which the state can protect historic buildings and an owner will not automatically be expropriated of his property if his application for a demolition permit is unsuccessful. From the case law discussed above one can infer that the South African courts have adopted a similar attitude as their German and American counterparts. In all three the South African cases the respective courts refused to set aside the heritage authorities' decisions to deny the demolition permits.[340]

It is clear that the denial of the demolition permit, and the subsequent declaration of the building as a historic landmark, can have far-reaching consequences for the owner. In many of the cases discussed above the denial of the demolition permit thwarted the owners' plans to develop their properties.[341] The preservation of the historic building can have extensive financial implications for the owner since he can be compelled to maintain the building.[342] Historic landmark designation can also freeze the property in its existing use.[343] Finally, once a building is formally protected the owner would be able to do very little on his property without first obtaining the consent of the heritage authorities. Both the German Federal Constitutional Court and the US Supreme Court confirmed that the prohibition against demolition is generally a justifiable

[340] *Provincial Heritage Resources Authority, Eastern Cape v Gordon* 2005 (2) SA 283 (E); *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C); *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2008 (3) SA 160 (SCA) and *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape*, *and others* 2009 (5) SA 512 (ECG).

[341] See for example *Penn Central Transportation Company v City of New York* 438 US 104 (1978); *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) and *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape, and others* 2009 (5) SA 512 (ECG).

[342] See in this regard the *Rheinland-Pfälzischen Denkmalschutz-und-Pflegegesetz* case *BVerfGE* 100, 226 [1999], where the owner could no longer afford to maintain the historic building, and *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape, and others* 2009 (5) SA 512 (ECG), where the owner was compelled to maintain the facade of the structure as well as the thin layer of plaster on the walls.

[343] *St. Bartholomew's Church v City of New York* 914 F 2d 348 (1990).

limitation of ownership entitlements since it will not deprive the owner of all reasonable uses of the property. Furthermore, property owners must accept that they will not always have the most beneficial use of their property available for exploitation. These potentially far-reaching consequences are deemed to be part of the obligations that accompany the ownership of historic buildings. The South African court in *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another*[344] acknowledged that the Heritage Resources Act has the potential to erode the ownership entitlements. However, the court stressed that ownership entitlements should be exercised in accordance with the social function of the law and the interests of the community. The court emphasised that an owner does not only have entitlements in relation to his property but also certain inherent responsibilities.[345] A balance must be struck between the protection of ownership, the exercise of ownership entitlements and the owner's obligations toward the community. The approach described by the court reflects the German view (expressed in Article 14.2 of the German Basic Law) that property ownership is accompanied by certain obligations.

The burden that is created by the denial of the demolition permit, and the subsequent formal protection of a building, must be evaluated in light of the property as a whole. This view was adopted by both the American[346] and German[347] courts and it appears as if the South African courts have adopted a similar line of reasoning. One of the factors that the court considered relevant in *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape*, *and others*[348] was that the owner would still be able to expand her guesthouse on the remaining part of her property.

There are instances where the burdens imposed on ownership by historic preservation laws will be considered excessive. On the basis of the categorical rule

[344] 2007 (4) SA 26 (C) 37.

[345] 2007 (4) SA 26 (C) 37.

[346] See in this regard *Penn Central Transportation Company v City of New York* 438 US 104 (1978) and *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency* 535 US 302 (2002).

[347] 1 *BvR* 2140/08 [2010].

[348] 2009 (5) SA 512 (ECG).

formulated in *Lucas v South Carolina Coastal Council*[349] one can conclude that in American law a heritage preservation law will cause an unconstitutional taking of property if it results in the owner being deprived of all reasonable economic use of this property. Alternatively, a court will have to conduct an ad hoc factual enquiry to ascertain whether a specific heritage preservation law places an excessive burden on the owner. This requires of the court to consider the three factors identified in *Penn Central*, namely character and the impact of the governmental action and the extent to which the action interferes with the distinct investment-backed expectations of the owner.[350] Subsequent case law shows that the limitations on ownership (imposed by heritage preservation law) will not be considered excessive if the original use or an alternative use of the property is still available or if the owner can still make a reasonable return on his investment. The German Federal Constitutional Court has found that a heritage preservation law will impose a disproportionate burden on the owner if he is unable to use his property in a reasonable manner; if he is unable to sell or to lease the property; if the maintenance of the structure has become prohibitively expensive and if the legislation does not provide for a mechanism to lessen the burden. Essentially, the owner will have to show that he has been deprived of all economic use of the property. Therefore, it seems that in all three jurisdictions it would only be in exceptional circumstances that a court will find that a historic preservation law imposes an excessive burden on the owner.

A characteristic that the German and American legal systems share is the incorporation of statutory measures that are designed to alleviate the burden of owning a protected building. In German law it is possible for the legislature to include equalisation provisions in heritage preservation laws that are specifically designed to prevent the imposition of disproportionate burdens on the owner. The legislative scheme in *Penn Central* incorporated transferable development rights which were held by owners of designated properties. The property owner in *Penn Central* could use his rights to develop its property in accordance with the heritage objectives set by the heritage authorities. Alternatively, the owner could sell these rights to neighbouring

[349] 505 US 1003 (1992).

[350] *Penn Central Transportation Company v City of New York* 438 US 104 (1978) 124.

property owners. Clearly these rights alleviated the burden that was imposed on the owner by the preservation laws.

In the South African context it is still unclear under which circumstances the Heritage Resources Act will cause an arbitrary deprivation of property as proscribed by section 25(1) of the Constitution. It has already been mentioned that to date, a litigant has not yet asserted that the denial of the demolition permit and the subsequent designation of his property has imposed an arbitrary deprivation of his property. Any deprivation that is directly imposed by the Heritage Resources Act must be scrutinised in light of the substantive arbitrariness test developed by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (*FNB*).[351] The *FNB* substantive arbitrariness will show when the limitation on the owner's demolition rights, coupled with a positive obligation to maintain the historic structure, will amount to an arbitrary deprivation of property. More specifically, this nuanced test requires of a court to balance opposing interests and to consider the complexity of the relationships involved in the dispute. In so doing, the court can establish when a statutory limitation (such as the limitation on demolition rights imposed by the Heritage Resources Act) goes too far in its interference with property rights. Moreover, the non-arbitrariness test will indicate when it might be necessary to mitigate an otherwise disproportionate burden imposed on the land owner (by the Heritage Resources Act) by way of an equalisation-style measure. Explained differently, it may show when it would be necessary to protect the exercise of ownership entitlements by way of a liability rule[352] (constitutional damages) instead of a property rule (demolition).

Any deprivation that is imposed by administrative action (authorised by the Heritage Resources Act) must also meet the standards set for administrative justice in section 33(1) of the Constitution, as given effect to by the Promotion of Administrative Justice Act 3 of 2000. In some instances it might be necessary to determine whether a

[351] 2002 (4) SA 768 (CC) para 100.

[352] See in this regard, Calabresi G and Melamed AD 'Property rules, liability rules and inalienability: one view of the cathedral' (1972) 85 *Harv L Rev* 1089-1128 and the explanation in chapter 6, section 6 4 below.

deprivation imposed by administrative action is substantively arbitrary because of its impact on the owner. These possibilities will be explored in greater detail in chapter 5. At this stage it suffices to say that whether the Heritage Resources Act imposes an arbitrary deprivation of property will depend on the specific facts of the case. A factor that a court might deem relevant is that the Heritage Resources Act does incorporate some measures to alleviate the property owner's burden.[353] On the one hand, it is possible that a court will find that these measures are sufficient to prevent the imposition of a disproportionate burden on the owner. On the other hand it is also possible that a court will find that the measures are too vague and inadequate to alleviate the burden preserving a historic building in the public interest.

Finally, there will be instances where the only option is to expropriate the owner of his property. The German Federal Constitutional Court confirmed that it is necessary to expropriate in circumstances where a historic preservation law imposes a disproportionate burden on a property and where the preservation of the building is still desired.[354] In American law the state would have to expropriate if the building is considered preservation-worthy, but where the effect of the heritage preservation law on ownership is deemed excessive. Likewise, one can assume that in South Africa there will also be instances where it would be necessary to expropriate the owner of his property.[355]

[353] See in this regard, the discussion in 4 2 above.

[354] *BVerfGE* 100, 226 [1999].

[355] Section 46 of the National Heritage Resources Act 25 of 1999 authorises the expropriation of property.

Chapter 5:
A constitutional analysis of the interests affected by the granting of or denying of a demolition order

5 1 Introduction

5 1 1 Section 25(1) of the Constitution: a general overview

Section 25(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) states:

> '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.

A deprivation of property is often the result of the statutory regulation of an owner's use, enjoyment and exploitation of his property, for a specific public purpose. Typically, property is regulated for the core public purpose of protecting public health and safety. However, it is widely accepted that the state can regulate property for purposes of land-use planning and development control, environmental conservation, the regulation of

building works and even historic preservation.[1] Within the South African context, yet another regulatory control purpose can be identified, namely, anti-eviction legislation that regulates the manner in which property owners evict unlawful occupiers from their land.

A deprivation can result in the diminishing of the value of property and other significant inroads on property rights. Van der Walt explains that loss caused by regulatory controls varies, and that in some instances the deprivation can be so severe that the property is completely destroyed.[2] Deprivations are not compensated because they serve a public purpose and it is presumed that the regulatory measure affects all owners more or less equally. In other words, all property owners are subjected to roughly similar statutory limitations and all owners derive roughly similar benefits from the regulation of their property interests.[3]

Section 25(1) of the Constitution has a dual purpose in the sense that it recognises that the state can regulate and limit the use, enjoyment and exploitation of property but also provides two constitutional requirements against which regulatory interferences

[1] Van der Walt AJ *Constitutional property law* 3 ed (2011) 196. See for example *Nyangane v Stadsraad van Potchefstroom* 1998 (2) BCLR 148 (T) 160E-G, where the court confirmed that it is the duty of local authorities to develop urban areas in a harmonious and co-ordinated way. It is permissible for local authorities to impose restrictive conditions to achieve this goal. In *Walele v The City of Cape Town and others* 2008 (11) BCLR 1067 (CC) para 2 the court explained that the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act) provides the framework in which the rights of property owners to develop their property should be balanced with the rights of neighbours. Likewise, in *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) 37 the court emphasised that ownership entitlements can only function in accordance with the social function of the law and the interests of communities. The National Heritage Resources Act 25 of 1999 (the Heritage Resources Act) provides the framework in which ownership should now function. Finally, in *PJ Ruck v Makana Municipality* (2628/2010) [2010] ZAECGHC 111 (24 November 2010) para 22 the court explained that laws (such as the Building Standards Act) are put in place to manage the tension between the right of property owners to develop their properties and the interest of the community in the safe and harmonious development of urban areas. These laws inform the content of ownership.

[2] Van der Walt AJ *Constitutional property law* 3 ed (2011) 196.

[3] Van der Walt AJ *Constitutional property law* 3 ed (2011) 201

should be tested.[4] These requirements are, first, that the deprivation must be authorised in terms of a law of general application and, second, that the deprivation may not be arbitrary.[5] Van der Walt explains that the law of general application requirement ensures that all deprivations are authorised by 'a properly promulgated and valid law'.[6] It also ensures that the law applies generally and that it does not single out an owner or a group of owners.[7] Van der Walt is of the view that regulatory legislation is as a rule of a

[4] Van der Walt AJ *Constitutional property law* 3 ed (2011) 17.

[5] Van der Walt AJ *Constitutional property law* 3 ed (2011) 225-228. Van der Walt argues that a third requirement, that of public purpose, can be read into either the law of general application requirement or into the non-arbitrariness requirement. He further argues that the public purpose requirement is implicit in section 25(1) because the section recognises the fact that property rights can be interfered with to protect public health and safety interests. The test for the public purpose requirement must relate directly to the 'core function of the police power' and typically a higher level of scrutiny is required when the purpose of the deprivation is not to protect public health and safety interests but is vaguely related to the public interest, such as aesthetic building regulations.

[6] Van der Walt AJ *Constitutional property law* 3 ed (2011) 232.

[7] Van der Walt AJ *Constitutional property law* 3 ed (2011) 232.

general nature and that it is unlikely that a regulatory deprivation will not meet the law of general application requirement.[8]

Initially, there was uncertainty as to the correct interpretation of the second requirement, namely that the deprivation may not be arbitrary. Originally, there were two divergent views concerning the correct interpretation of the non-arbitrariness requirement. One view was that the non-arbitrariness requirement referred to a rational connection between the deprivation and a purpose for which the deprivation was imposed.[9] Another view was that the non-arbitrariness requirement referred to a 'thicker' proportionality-style enquiry, with the implication that the deprivation could not impose an excessive burden on an individual owner or group of owners for the benefit of the general public.[10] In terms of the 'thicker' approach a deprivation had to be proportionate to the purpose it sets out to achieve.[11] This uncertainty had to some extent been laid to rest by the authoritative decision of *First National Bank of SA Ltd t/a Wesbank v*

[8] Van der Walt AJ *Constitutional property law* 3 ed (2011) 233-234. Van der Walt further explains that section 25(1) refers to 'law of general application' instead of 'a law of general application'. This indicates that a deprivation can also be authorised by customary or the common law. Deprivations authorised by the common or customary law should also meet the non-arbitrariness requirement. Van der Walt reasons that property rights are regulated by way of legislation and that it is difficult to conceive of a situation where a deprivation will raise section 25(1) issues if it is authorised by either the common or customary law. He argues that if such deprivations are possible, this may raise questions concerning the horizontal application of section 25. By contrast, Roux argues, with reference to *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC), that section 25(1) does not protect persons from deprivations caused by private actors acting in terms of the common law. Roux explains that it would be unnecessary to rely on section 25(1), even if the common law caused a deprivation of property, because section 173 of the Constitution enables the courts to develop the common law. Moreover, section 39(2) of the Constitution requires of the courts to develop the common law to promote the 'spirit, purport and objects of the Bills of Rights'. By way of section 25(1), the Bill of Rights protects people from being arbitrarily deprived of their property. Accordingly, it would generally be unnecessary to determine whether section 25 is directly relevant in the dispute. See in this regard Roux T 'Property' in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* Volume 3 2 ed (2003 original service: Dec 2003) chapter 46 at 6-7.

[9] Van der Walt AJ *Constitutional property law* 3 ed (2011) 237.

[10] Van der Walt AJ *Constitutional property law* 3 ed (2011) 238.

[11] Van der Walt AJ *Constitutional property law* 3 ed (2011) 238.

Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (*FNB*).[12] The *FNB* decision is discussed below; at this stage it suffices to say that the court adopted a 'thick' interpretation of the non-arbitrariness requirement.[13]

The *FNB* decision is significant for two reasons. Firstly, it is significant because of the methodology proposed by the court, in terms of which future constitutional property challenges should be assessed. This methodology should be understood in light of the court's distinction between deprivation and expropriation. Secondly, *FNB* is also significant because of the test formulated by the court to determine whether or not a particular interference amounts to an arbitrary deprivation of property. The discussion in the section below is centred on these two important aspects of the *FNB* judgment. This discussion delineates the *FNB* methodology that is applied as a point of departure to assess the constitutionality of the limitations imposed on ownership and other property interests described in chapters 2, 3 and 4.

[12] 2002 (4) SA 768 (CC).

[13] Van der Walt AJ *Constitutional property law* 3 ed (2011) 53-54. Van der Walt further explains that Constitutional Court in *FNB* confirmed its purposive approach since it ascribed a '"thick", context-sensitive, balancing interpretation to the non-arbitrariness provision in section 25(1)'. The fact that the arbitrariness of the deprivation has to be assessed with reference to the nature of the property, scope of the deprivation and the various relationships involved indicates that the court intended to create a balancing test. This balancing test enables a court to balance the individual's interests in his property with the public interest in the regulation of property when assessing the constitutionality of a deprivation. Roux T 'Property' in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* Volume 3 2 ed (2003 original service: Dec 2003) chapter 46 at 24 argues that the *FNB* arbitrariness test contains a built-in mechanism to adjust the level of scrutiny required in a specific context. The thickness of the test depends on the court's analysis of the various relationships listed in paragraph 100 of the judgment (see 5 1 2 below), the nature of the deprivation and the type of property interest in question. Roux explains that the level of scrutiny will 'vacillate between two fixed poles: rationality review and the lower end of the scale, and something just short of a review for proportionality at the other'. Roux further argues that the arbitrariness test leaves much room for the exercise of judicial discretion because the factors that a court will take into account, as well as the level of scrutiny to be applied, depends on the circumstances of the case.

5 1 2 The *FNB* methodology and the substantive arbitrariness test

In *FNB*, the Constitutional Court had to decide whether a lien, established in terms of section 114 of the Customs and Excise Act 91 of 1964 (the Act), over three vehicles owned by the appellant amounted to an arbitrary deprivation of property as proscribed by section 25(1).[14] The generous interpretation afforded to 'property' for purposes of section 25(1) of the Constitution is a feature worth mentioning before describing the court's methodology for assessing the constitutionality of deprivations. In this regard, the court stated that it would be unwise and impossible to ascribe a comprehensive meaning to 'property' for purposes of section 25(1). It is, nonetheless, safe to say that, 'ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property'.[15] The court held that the fact that the owner of the property made no or little use of the property was not a factor that it would take into account when deciding whether the object (of the dispute) amounted to constitutional property.[16] Factors such as the owner's subjective interest in the object and the economic value of the object will not be relevant when deciding whether or not the object in dispute constitutes constitutional property either.[17]

The *FNB* methodology should be understood within the context of the court's distinction between deprivations and expropriations. In this regard, the court held that 'in a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in

[14] 2002 (4) SA 768 (CC) paras 7-9. The vehicles were made available to clients of the appellant on the basis of two lease agreements and an instalment sale agreement. These vehicles were seized by the commissioner to satisfy customs and excise debt owed to it by the appellant's clients.

[15] 2002 (4) SA 768 (CC) para 51.

[16] 2002 (4) SA 768 (CC) para 54.

[17] 2002 (4) SA 768 (CC) para 56.

the property concerned'.[18] Deprivation embraces the wider category of interferences with property rights and expropriation amounts to a narrower category of interference. In

[18] 2002 (4) SA 768 (CC) para 57. In *Mkontwana v Nelson Mandela Metropolitan Municipality and another; Bisset and others v Buffalo City Municipality and others; Transfer Rights Action Campaign and others v MEC, Local Government and Housing, Gauteng, and others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32 the Constitutional Court adopted a different interpretation of 'deprivation' for purposes of section 25(1) of the Constitution. The court held that 'at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation'. Van der Walt AJ 'Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality and another; Bisset and others v Buffalo City Municipality and others; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* (CC)' (2005) 122 *SALJ* 75-89 at 79-80 and Van der Walt AJ *Constitutional property law* 3 ed (2011) 204-209 criticises this aspect of the *Mkontwana* judgment. Van der Walt argues that the court's interpretation of deprivation as only substantial interferences with property rights is problematic. He explains that it is peculiar to classify deprivation as interferences that go beyond the restrictions that can be imposed in an open and democratic society, because all legitimate regulatory restrictions on the use of property are normal in such a society. Furthermore, the purpose of section 25(1) is to legitimise all regulatory controls and the concomitant deprivations without placing any additional burdens on the state, because these deprivations are uncompensated and subject to constitutional review. However, if slight interferences were excluded from the definition of deprivation they would not be subjected to constitutional scrutiny. This would create uncertainty as to when an interference would be sufficiently severe to be classified as a deprivation. Van der Walt explains that it is preferable to assume that all interferences with property rights are deprivations, which have to meet the requirements set out in section 25(1) of the Constitution. The *Mkontwana* interpretation was cited with approval in *Offit Enterprises (Pty) Ltd and another v Coega Development Corporation (Pty) Ltd and others* 2011 (1) SA 293 (CC) paras 38-39, but a closer reading of the case reveals that the court did not really apply this interpretation. Likewise, in *Reflect-All 1025 CC v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) (*Reflect-All*) both the majority and minority of the court confirmed that 'deprivation' for purposes of section 25(1), should not be interpreted too narrowly. Van der Walt argues that it seems as if the court in *Reflect-All* followed the wider interpretation of 'deprivation' as formulated in *FNB* rather than the narrow interpretation adopted in *Mkontwana*.

other words, expropriations are a subspecies of deprivation.[19] The implication of this approach is that:

> '[t]he starting point for constitutional analysis, when considering any challenge under s 25 for the infringement of property rights, must be s 25(1)'.[20]

The court explained that if a deprivation fails to meet the section 25(1) requirements and if it cannot be justified under section 36 of the Constitution, 'then that would be the end of the matter'.[21] If the deprivation meets the requirements of section 25(1) or if the deprivation can be justified under section 36, a court can proceed to consider whether an expropriation has taken place. Consequently, a court must answer the following questions when adjudicating a constitutional property challenge:

(a) Does that which has been taken away from the owner amount to property for purposes of section 25 of the Constitution?

(b) Has there been a deprivation of property?

(c) If there has been a deprivation of property, is it consistent with the provisions of section 25(1) of the Constitution?

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[19] Van der Walt AJ *Constitutional property law* 3 ed (2011) 222. See further Van der Walt AJ 'Striving for the better interpretation – a critical reflection on the Constitutional Court's *Harkson* and *FNB* decisions on the property clause' (2004) 121 *SALJ* 854-878 at 867. This distinction differs considerably from the approach followed in *Harkson v Lane NO and others* 1998 (1) SA 300 (CC) paras 31-40. In that case the court adopted the view that deprivations and expropriations are two separate categories of state interferences. Van der Walt explains that the court in *Harkson* assumed that a litigant had to argue either that he had been deprived of his property or that he was expropriated of his property. The implication was that a court would not have to consider the alternative once the applicant had argued that he had either been expropriated or deprived of his property.

[20] 2002 (4) SA 768 (CC) para 60.

[21] 2002 (4) SA 768 (CC) para 59.

(d) If the deprivation is not consistent with the provisions of section 25(1), can it be justified under section 36 of the Constitution?[22]

(e) If the deprivation can be justified under section 36 of the Constitution, does it amount to an expropriation of property for purposes of section 25(2) of the Constitution?[23]

[22] Roux T 'Property' in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* Volume 3 2 ed (2003 original service: Dec 2003) chapter 46 at 26. Roux explains that it is unlikely that a deprivation would be justifiable in terms of section 36(1) of the Constitution if that deprivation does not meet the requirements set out in section 25(1). Both sections 36(1) and 25(1) of the Constitution contain the law of general application requirement. If a deprivation is not authorised in terms of a law of general application, it would not pass the section 36(1) limitation test. Similarly, if a deprivation is arbitrary and in contravention of section 25(1), logic dictates that it is highly unlikely that it would amount to a 'reasonable and justifiable' limitation on property rights. Accordingly, one can conclude that an arbitrary deprivation of property will never amount to a justifiable limitation of the owner's property rights in terms of section 36 of the Constitution. See to the same effect Van der Walt AJ *Constitutional property law* 3 ed (2011) 78.

(f) If it is an expropriation of property, does it comply with the provisions of section 25(2)(a) and (b) of the Constitution?

(g) If the expropriation does not comply with section 25(2)(a) and (b) of the Constitution, can it be justified under section 36 of the Constitution?[24]

The court centred its judgment on step (c) of the methodology and formulated a 'thick' test. In terms of this test, courts in the future can determine if a deprivation is arbitrary and in contravention of section 25(1) of the Constitution.[25] The court held that a

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[23] Roux T 'Property' in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* Volume 3 2 ed (2003 original service: Dec 2003) chapter 46 at 2-5 and 18-19. Roux argues that, if the *FNB* methodology is followed to assess the constitutionality of a state interference, it is unlikely that the analysis will proceed beyond the third step. This could be ascribed to the 'telescoping effect' or 'vortex effect' of the non-arbitrariness requirement in section 25(1). This effect will become evident in instances where a litigant seeks to challenge an expropriation of property on one of the grounds listed in section 25(2) or (3). In terms of *FNB* all expropriations are a subspecies of deprivations, which means that an expropriation would have to comply with the requirements set out in section 25(1), (2) and (3) of the Constitution. However, an expropriation that does not comply with either 25(2) or (3) is unlikely to pass the arbitrariness test set out in section 25(1). In essence, the expropriation will never be tested against section 25(2) and (3), because it would have already fallen foul of the non-arbitrariness requirement. See to the same effect Van der Walt AJ *Constitutional property law* 3 ed (2011) 75-78. Recent case law has shown that the courts have elected to bypass the first four requirements of the *FNB* methodology in instances where it is clear that the dispute relates to an expropriation of property. See for example, *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) and *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154 (12 October 2010). Furthermore, in *Haffejee NO and others v Ethekwini Municipality and others* 2011 (6) SA 134 (CC) paras 28-31 the Constitutional Court noted, in line with *FNB*, that the point of departure for a constitutional analysis is section 25(1). However, the court did not delve into the section 25(1) component of the analysis and proceeded to evaluate the expropriation in light of the requirements of section 25(2). Van der Walt notes that this approach shows that the courts avoid the vortex effect of the non-arbitrariness requirement described by Roux. In particular, the court does not accept that an expropriation 'that might fail the s 25(2) requirements would already fail the arbitrariness test'. See in this regard Van der Walt *Constitutional property law* 3 ed (2011) 285.

[24] 2002 (4) SA 768 (CC) para 46.

[25] Paraphrased from Van der Walt AJ 'Striving for the better interpretation – a critical reflection on the Constitutional Court's *Harkson* and *FNB* decisions on the property clause' (2004) 121 *SALJ* 854-878 at 869.

deprivation would be arbitrary if the 'law of general application' does not provide 'sufficient reason for the particular deprivation in question or is procedurally unfair.'[26] Unfortunately, the court did not elaborate on the meaning and content that should be attributed to the 'procedurally unfair' requirement. The role of procedural fairness for purposes of the property clause is considered in section 5 1 3 below.

The court explained that 'sufficient reason' must be established with reference to at least eight contextual considerations. These considerations mainly require an analysis of the 'complexity of the relationships' involved. In particular, the court must consider the relationship between the means employed (the deprivation) and the ends sought, namely the purpose of the law in question; the relationship between the purpose of the deprivation and the effect that it will have on the property owner; as well as the relationship between the purpose of the deprivation, the nature of the property and the extent of the deprivation with regard to the property.[27] When the property in question

> 'is ownership of land or a corporeal moveable a more compelling purpose will have to be established for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive'.[28]

Another consideration is that when there is a deprivation of 'all the incidents of ownership', the purpose for the deprivation must be more 'compelling' than in instances where there was only a deprivation of some of the incidents of ownership.[29] The court further explained that, 'depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation', there will be circumstances where sufficient reason can be determined by a 'mere rational relationship between means and ends'.[30] There will, however, be circumstances where sufficient reason can only be determined by 'a proportionality evaluation closer to that

[26] 2002 (4) SA 768 (CC) para 100.

[27] 2002 (4) SA 768 (CC) para 100; Van der Walt AJ *Constitutional property law* 3 ed (2011) 245. The requirements are listed here as they are listed in Van der Walt's book.

[28] 2002 (4) SA 768 (CC) para 100.

[29] 2002 (4) SA 768 (CC) para 100.

[30] 2002 (4) SA 768 (CC) para 100.

required by s 36(1) of the Constitution'.[31] The final consideration is 'sufficient reason' for the deprivation, which must be decided with reference to all the relevant facts in a specific case. One should always bear in mind that 'the enquiry is concerned with "arbitrary" in relation to the deprivation of property under s 25.'[32]

Against this background, the court explained that section 114 of the Act had a legitimate and important legislative purpose, namely to claim payment of an outstanding customs and excise debt. Nevertheless, section 114 of the Act cast the net too wide in the sense that it completely deprived owners of their property in circumstances where the property owner had no connection with the transaction that gave rise to the debt, and where the property had no connection with the customs debt. What is more, the property owner had not done anything that caused the commissioner to act to his detriment.[33] The court concluded that due to the lack of any relevant nexus there was insufficient reason for the deprivation and that FNB was arbitrarily deprived of its property.[34]

The Constitutional Court applied the substantive arbitrariness test in the recently decided *Reflect-All 1025 CC v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government* (*Reflect-All*).[35] In this case, the court had to determine whether section 10(1) and 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 (the Infrastructure Act) imposed a procedurally arbitrary deprivation of property.[36] This aspect of the judgment is discussed in greater detail in section 5 1 3 below. The court also had to determine whether section 10(3) imposed a

[31] 2002 (4) SA 768 (CC) para 100.

[32] 2002 (4) SA 768 (CC) para 100.

[33] 2002 (4) SA 768 (CC) para 108.

[34] 2002 (4) SA 768 (CC) para 109.

[35] 2009 (6) SA 391 (CC).

[36] 2009 (6) SA 391 (CC) para 48.

substantively arbitrary deprivation of property.[37] This decision is significant because of O' Regan J's dissenting judgment, where she held that section 10(3) imposed a substantively arbitrary deprivation of property because the legislative scheme did not incorporate a procedural mechanism that would alleviate the burden imposed on property owners.

Prior to the enactment of the Infrastructure Act, roads were constructed and planned in accordance with the provisions of the old ordinance.[38] Route determinations and designs for future roads were published in the provincial *Gazette*. Affected land owners were often consulted prior to the publishing of the notice, but this procedure was not obligatory. No legal restrictions were placed on the use of land that fell within the determined routes and designs.[39] Some roads have been constructed in accordance with these determined routes and designs. However, many of the routes and designs are more than three decades old and it is unclear whether they will ever be built.[40] It is evident that a considerable amount of public funds has gone into the development of the designs and preliminary routes.[41] The Infrastructure Act repealed and replaced the planning regime created under the old ordinance and it changed the procedure for

[37] 2009 (6) SA 391 (CC) paras 1, 5 and 8. The applicants were the owners of about twenty properties in the Gauteng area. They launched proceedings in the court *a quo*, where it was decided that section 10(3) of the Infrastructure Act was unconstitutional insofar as it arbitrarily deprived the applicants of their property. The court decided that section 10(1) was consistent with section 25(1) of the Constitution, because under the previous ordinance the owners were adequately consulted. The court *a quo* held that it would be impossible and impractical to disregard the consultation procedures prescribed under the previous ordinance. This would 'stultify' the construction of roads in accordance with preliminary work that had been done under the old ordinance. Accordingly, it could not be said that section 10(1) was procedurally arbitrary and in violation of section 25(1) of the Constitution.

[38] 2009 (6) SA 391 (CC) para 17.

[39] 2009 (6) SA 391 (CC) para 17.

[40] 2009 (6) SA 391 (CC) para 18.

[41] 2009 (6) SA 391 (CC) para 18.

declaring route determinations and designs.[42] It further imposed, by way of section 10(1) and (3), legal restrictions on land that overlap these routes and designs.[43]

The majority of the court confirmed that the deprivations caused by section 10(3) were sufficiently severe to warrant a proportionality analysis.[44] It decided that the Infrastructure Act did allow property owners to apply for amendments to the route design.[45] Furthermore, the court held that the owners were not deprived of their entire properties and that the Infrastructure Act maintained a balance between the public interest in the preservation of the hypothetical road network and private property interests.[46] As a result, it could not be said that section 10(3) was disproportionate to the

[42] 2009 (6) SA 391 (CC) para 19.

[43] 2009 (6) SA 391 (CC) paras 19, 21 and 23. Section 10(1) provides that route determinations are subject to the restrictions contained in section 7, which provides that applications for the establishment of a township must, together with a civil engineering report, be submitted to the MEC for comments. These comments will be considered by the municipality when making a decision. Furthermore, section 7 prohibits any service provider from laying services over and below the route without the consent of the MEC. Section 10(3) determines that preliminary designs are subject to the restrictions contained in section 9 of the Infrastructure Act. A closer inspection of this section reveals that it only places restrictions on areas that fall within the road and rail reserve boundary of the preliminary design. Section 9 prohibits, amongst other things, the granting of applications for the subdivision of land and the change in land use in terms of a law or town planning scheme. In essence, these restrictions have the effect of freezing land (situated within the stipulated area) in its existing use. Section 9 further prohibits service providers from laying, adding and constructing services below, and above, the land without the written permission of the MEC. Once a route or a design has been published the consultation procedure that would normally be compulsory is deemed to have taken place.

[44] 2009 (6) SA 391 (CC) para 49. The court applied the *FNB* substantive arbitrariness test and explained that in determining whether section 10(3) was proportional, it had to consider the nature of the property involved; the extent of the deprivation; and whether there are less restrictive means available to achieve the purpose.

[45] 2009 (6) SA 391 (CC) para 55. The court explained that the owners could in terms of section 8(9) of the Infrastructure Act request of the MEC in writing to 'revisit the preliminary designs that affect portions of their property within the road reserve'.

[46] 2009 (6) SA 391 (CC) para 49. The court explained that the property owners were not entirely deprived of their property since the restrictions in section 9 only affected land that was situated within the road reserve.

end it sought.[47] The court held that section 10(3) did not impose a substantively arbitrary deprivation of property.

In her minority judgment, O' Regan J held that section 10(3) imposed an arbitrary deprivation of property insofar as it did not make provision for a periodic review process where the proposed road network could be scrutinised.[48] She emphasised that the Infrastructure Act has a legitimate purpose, namely to protect the 'integrity of the planning system'.[49] She further explained that it made sense to prevent property owners from using the land in a manner that would render the implementation of the road scheme, economically or otherwise, impossible.[50] Nonetheless, there are instances where it is clear that some of the roads will never be built and yet the property will be frozen in its existing use for what may appear to be an indeterminate period.[51] In such instances, section 10(3) imposes an arbitrary deprivation of property because the limitation imposed on property rights is disproportionate to the purpose of the Act.[52] The disproportionality of the deprivation would be mitigated by a review process where the planned road network could be scrutinised for roads that will not be built as a result of changed circumstances.[53] This review process would also afford property owners the opportunity to be heard, especially in cases where the scheme was introduced at a time when there initially was no provision for them to be heard.

In essence, O' Regan J concluded that the deprivation was arbitrary because the legislature did not provide a procedural mechanism where the imposition of a disproportionate burden on property owners could be avoided or assuaged. Within the

[47] 2009 (6) SA 391 (CC) para 58.

[48] 2009 (6) SA 391 (CC) paras 110-112. O' Regan J explained that section 10(3) read with section 9 of Act 8 of 2001 has the effect of depriving property owners whose property falls within the road reserve area of the right to proclaim a township, to subdivide the property or the right to change the land use of the property. This deprivation was particularly burdensome in light of the rapid rate of urbanisation and economic development in Gauteng.

[49] 2009 (6) SA 391 (CC) para 108.

[50] 2009 (6) SA 391 (CC) para 108.

[51] 2009 (6) SA 391 (CC) para 107.

[52] 2009 (6) SA 391 (CC) para 109.

[53] 2009 (6) SA 391 (CC) para 110.

context of the case, the mechanism had to be an administrative review process where property owners could make themselves heard and in terms of which the road scheme could be evaluated. O' Regan J's finding in *Reflect-All* is comparable to the conclusion reached in the *Rheinland-Pfälzisches Denkmalschutz-und-Pflegegesetz* case.[54] In that case, the German Federal Constitutional Court determined that the preservation law imposed a disproportionate burden on a property owner insofar as she was deprived of the right to demolish a building for which she had no economic use. The German Federal Constitutional Court explained that the preservation law would have been saved from a finding of invalidity if the legislature had incorporated an equalisation measure (*Ausgleich*) specifically designed to prevent the imposition of a disproportionate burden on the owner. An equalisation provision in this case could include – but was not restricted to – a monetary payment to assist the owner with the burden of owning and maintaining an historic building.[55] O' Regan J's dissenting judgment suggests that it might be necessary to include equalisation-style measures in legislation that fulfils an important public function, but that could potentially impose disproportionate burdens on property owners. Such a development is necessary to prevent otherwise legitimate laws

[54] *BVerfGE* 100, 226 [1999]. This case is discussed in chapter 4, section 4 5 2. See further Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 119-121 and Du Plessis E 'To what extent may the state regulate private property for environmental purposes? A comparative study' 2011 *TSAR* 512-526 at 523.

[55] Van der Walt AJ *Constitutional property law* 3 ed (2011) 367 explains that the textbook example of a equalisation measure is the construction of a new road, which causes excessive hardship in the form of road noise that neighbouring property owners have to bear. In such instances, the state is obliged to prevent the scheme from being disproportionate and invalid, for instance by installing noise reduction measures for the property owners. Alternatively, the state could pay the property owners an amount (called an equalisation sum) to install noise reduction measures themselves. The crucial point is that these equalisation sums are not compensation for expropriation (because nothing was expropriated) or for delict (because the state action was lawful). An equalisation sum alleviates the unwanted and disproportionately unfair results of an otherwise valid regulatory action and, in so doing, prevents the scheme from being invalid.

from being declared unconstitutional for imposing excessive burdens on property owners.[56]

In summary, a deprivation must meet two requirements to pass constitutional scrutiny, namely it must be imposed by law of general application and it may not be arbitrary. The Constitutional Court has confirmed in *FNB* that a deprivation will be arbitrary if the law does not provide sufficient reason for such a deprivation or is procedurally unfair.[57] Sufficient reason must be determined with reference to eight contextual factors which direct a court in its analysis of the complexity of the relationships involved in the dispute. These contextual factors requires of the court to scrutinise the relationship between the deprivation and the ends sought to achieve it; the relationship between the affected person and the deprivation and the relationship between the purpose of the deprivation, the nature of the property and the extent of the interference with property rights. Moreover, there must be more compelling reasons for the deprivation if it affects the ownership of land and corporeal movables than in the instance where the affected property right is something different. Likewise, when the deprivation embraces all the incidents of ownership the reasons for the deprivation will have to be more persuasive than in the instance where the deprivation affects only some incidents of ownership. Depending on the interaction between these factors, there are instances where sufficient reason will be established if there is a rational relationship between means and ends. In other instances, it would be necessary for the court to adopt a proportionality enquiry similar to the evaluation required in section 36(1) of the Constitution. Finally, each case will have to be assessed with reference to its

[56] Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 43-47 argues that it is essential to investigate the possibility of incorporating equalisation measures into South African law. These measures will prevent the imposition of disproportionate burdens on land owners as it reduces loss or damage caused by lawful state action.

[57] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

context-specific facts and a court should bear in mind that 'the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25'.[58]

5 1 3 Procedural arbitrariness

As explained above, in *FNB*[59] the Constitutional Court held that a deprivation would be arbitrary if the law provided insufficient reason for the deprivation, or if it is procedurally unfair.[60] This decision is significant for two reasons. Firstly, the court developed the methodology in terms of which future constitutional property challenges should be assessed. Secondly, the court formulated a test for determining whether a deprivation is substantively arbitrary. Unfortunately, the court failed to explain what it meant when it stated that a deprivation will be arbitrary if the law is procedurally unfair. From the *FNB* judgment one can infer that, in addition to substantive arbitrariness, procedural fairness is a separate ground for finding that a deprivation is arbitrary and unconstitutional.[61]

Since *FNB* only two other Constitutional Court cases have mentioned the concept of procedural fairness in relation to a section 25(1) dispute, namely *Reflect-All*[62] and *Mkontwana v Nelson Mandela Metropolitan Municipality and another; Bisset and others v Buffalo City Municipality and others; Transfer Rights Action Campaign and others v MEC, Local Government and Housing, Gauteng, and others (KwaZulu-Natal Law*

[58] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[59] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

[60] 2002 (4) SA 768 (CC) para 100.

[61] Van der Walt AJ *Constitutional property law* 3 ed (2011) 264-265.

[62] *Reflect-All 1025 CC v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC).

Society and Msunduzi Municipality as Amici Curiae) (*Mkontwana*).[63] In *Mkontwana* the court explained that in contexts other than section 25(1) it has held that 'procedural fairness is a flexible concept and the requirements that must be satisfied to render an action or a law procedurally fair depend on all the circumstances'.[64] This approach also applies to procedural fairness for purposes of section 25(1) of the Constitution. The court held that the law was not procedurally unfair because it could be interpreted to mean that there was an obligation on the municipality to furnish the owner with information concerning outstanding water and electricity debts incurred by occupiers of the property upon the receipt of a written request.[65]

In *Reflect-All* the applicants argued that section 10(1) of the Act was procedurally arbitrary insofar as it enabled the MEC to declare route determinations without affording the property owners a procedure in terms of which their interests could be considered. They further argued that the consultations that had taken place under the earlier ordinance was inadequate, in the sense that it was not obligatory and in that it would not comply with the provisions of the Promotion of the Administrative Justice Act 3 of 2000 (PAJA). Moreover, the consultations had taken place more than 30 years previously and

[63] 2005 (1) SA 530 (CC) paras 1-2 and 65-67. This case concerned the constitutional validity of laws that made property owners liable for the unpaid water and electricity debts incurred by occupiers of their properties. The appellants challenged section 118 (1) of the Local Government: Municipal Systems Act 32 of 2000, which prohibited the transfer of property if all outstanding consumption charges in relation to the property were not paid. The appellants argued that the limitation on their right to transfer amounted to an arbitrary deprivation of their property. They also alleged that section 118(1) was procedurally unfair insofar as it failed to compel the municipality to provide owners, on a continuous basis, with information concerning outstanding consumptions debts incurred by occupiers of their properties.

[64] 2005 (1) SA 530 (CC) para 65, with reference to *Premier, Mpumalanga, and another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 39; *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) para 216; *Janse Van Rensburg NO and another v Minister of Trade and Industry and another NNO* 2001 (1) SA 29 (CC) para 24; *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para 19; *Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) para 101.

[65] 2005 (1) SA 530 (CC) para 67.

did not involve the current land owners. These consultations did not take current circumstances pertaining to the use of land into account.[66] In relation to section 10(3), the applicants argued that the provision had to be interpreted in such a way that it gave the MEC the discretion to consider each preliminary design individually, prior to the publishing of a notice in the provincial *Gazette*. They contended that such an interpretation would be in line with the standard set for procedural fairness in PAJA.[67] Such an interpretation would also give effect to the procedural guarantee of section 25(1) of the Constitution.[68] The applicants argued that if this interpretation was rejected, the provision would be procedurally arbitrary.[69]

The court decided that the sections were not procedurally arbitrary and it explained that the attack on section 10(1) had to fail because it would be unrealistic to ignore the consultative processes that had taken place under the old ordinance.[70] With reference to section 10(3), the court held that it would be practically impossible and too expensive for the MEC to consult with every property owner whose land was affected by the creation of the preliminary designs under the previous ordinance.[71]

Van der Walt argues that the *FNB* and *Mkontwana* decisions create the impression that a limitation on the use of property, which raises procedural fairness issues, should be assessed according to the principles for administrative justice in section 33 of the Constitution, as given effect to in PAJA, if it was imposed by administrative action.[72] Explained differently, a procedurally unfair deprivation of property brought about by administrative action should be assessed in terms of section 33 of the Constitution and

[66] 2009 (6) SA 391 (CC) para 11.

[67] 2009 (6) SA 391 (CC) para 12.

[68] 2009 (6) SA 391 (CC) para 44.

[69] 2009 (6) SA 391 (CC) para 12.

[70] 2009 (6) SA 391 (CC) paras 40-43.

[71] 2009 (6) SA 391 (CC) paras 44-47.

[72] Van der Walt AJ *Constitutional property law* 3 ed (2011) 265. Section 1(i)(b) of the Promotion of Administrative Justice Act 3 of 2000 defines administrative action as any 'decision taken, or any failure to take a decision, by a natural or a juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct, external legal effect...'

PAJA and not in terms of section 25(1).[73] This raises the question of whether the sole purpose of a section 25(1) enquiry is to prevent a substantively arbitrary deprivation of property.[74] Van der Walt argues that it seems peculiar that the Constitutional Court (in all three cases) would suggest that a procedurally unfair deprivation of property should be assessed in terms of the non-arbitrariness requirement in section 25(1).[75] Van der Walt reasons that the solution to this predicament lies in the principal difference between the cases, namely the source of the deprivations. The deprivations of property rights in both *FNB* and *Mkontwana* were imposed by legislation.[76] By contrast, in *Reflect-All*, the source of the deprivation was not legislation but the decision of the MEC to proclaim route determinations (administrative action).[77] Viewed from this perspective, it is evident that, unlike the *Reflect-All* deprivation, it would not have been possible in *FNB* or in *Mkontwana* to review the deprivation in light of the standard set for procedural fairness in PAJA.[78] However, in *FNB* and in *Mkontwana*, it was in theory necessary to determine whether the legislation imposed a procedurally unfair deprivation of property. In this regard Van der Walt explains that

> '[i]f a deprivation is imposed by legislation in a procedurally unfair manner, judged according to the same principles that apply in administrative law under PAJA, the deprivation would be arbitrary and therefore the legislation in question could be challenged in terms of section 25(1) for permitting arbitrary deprivation'.[79]

A deprivation caused by legislation differs from the *Reflect-All* deprivation, which was caused by administrative action and which should be measured against the standards set for procedural fairness in PAJA.[80] If a deprivation is brought about by administrative

[73] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267.

[74] Van der Walt AJ *Constitutional property law* 3 ed (2011) 266.

[75] Van der Walt AJ *Constitutional property law* 3 ed (2011) 266.

[76] In *FNB* the source of the deprivation was section 114 of the Customs and Excise Act 91 of 1964 and in *Mkontwana* section 118(1) of the Local Government: Municipal Systems Act 32 of 2000.

[77] *Reflect-All 1025 CC v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) para 11.

[78] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267.

[79] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267.

[80] Van der Walt AJ *Constitutional property law* 3 ed (2011) 269.

action, it cannot be scrutinised in terms of section 25(1) and it will be invalid insofar as it does not comply with PAJA or with the administrative justice provisions incorporated in the authorising legislation.[81] This deprivation can subsequently be set aside on review in terms of PAJA. Deprivations caused by procedurally unfair legislation will be procedurally arbitrary and unconstitutional for being in conflict with section 25(1).

Van der Walt argues that the *Reflect-All* decision blurs the distinction between deprivations caused by legislation and deprivations caused by administrative action.[82] In *Reflect-All*, the court scrutinised the procedural fairness of the deprivations (that were caused by administrative action) in light of PAJA, but it concluded that the deprivations were not procedurally arbitrary. Van der Walt explains that *Reflect-All* incorrectly creates the impression that a procedurally unfair deprivation will amount to an arbitrary deprivation of property, as proscribed by section 25(1), even if it is caused by administrative action.[83] Van der Walt is of the view that the deprivation in *Reflect-All* should have been scrutinised in light of PAJA and section 33(1) and that it never raised a section 25(1) issue because the deprivation was caused by administrative action.[84] Furthermore, the court's approach in *Reflect-All* contradicts the principle of subsidiarity.[85] PAJA was enacted to give effect to section 33(1) of the Constitution,

[81] Van der Walt AJ *Constitutional property law* 3 ed (2011) 269.

[82] Van der Walt AJ *Constitutional property law* 3 ed (2011) 268.

[83] Van der Walt AJ *Constitutional property law* 3 ed (2011) 268.

[84] Van der Walt AJ *Constitutional property law* 3 ed (2011) 269.

[85] Van der Walt AJ *Constitutional property law* 3 ed (2011) 268. The subsidiary principle was first formulated in *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51-52, and it provides that if legislation has been enacted to give effect to a constitutional right, a litigant cannot rely directly on the constitutional right when launching an action to protect that right against interference. Rather, it is necessary for the litigant to rely on the legislation to protect his right from infringement. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) is an example of legislation enacted to give effect to a constitutional right, namely the right to just administrative action embodied in section 33 of the Constitution. This approach should only be followed if the litigant wants to protect a constitutional right that is given effect to by legislation. A litigant may rely on the constitutional right directly if he wants to challenge the constitutional validity of the legislation. For a detailed explanation of the subsidiarity principle, refer to Van der Walt AJ 'Normative pluralism and anarchy: reflections on the 2007 term' (2008) 1 *CCR* 77-128 at 100-103.

which requires that administrative action should be lawful, reasonable and procedurally fair. A dispute concerning the procedural fairness of a deprivation of property caused by administrative action should therefore be adjudicated in terms of PAJA and section 33 and not in terms of section 25(1).[86]

Van der Walt also argues that a deprivation caused by administrative action can be substantively arbitrary because there is insufficient reason for such a deprivation.[87] This implicates that a litigant will be able to make a case either on the basis of substantive arbitrariness and section 25(1), or on the basis of procedural fairness and PAJA. A property owner should rely on section 25(1) if a deprivation is substantively arbitrary because of the impact of the administrative action on ownership. A property owner should rather rely on PAJA and section 33(1) if a deprivation is procedurally arbitrary because of the manner in which the administrative discretion or procedure is exercised.[88]

As explained above, deprivations caused by legislation will be procedurally arbitrary if they do not comply with the standard set for administrative justice and specifically for procedural fairness in PAJA. Van der Walt explains that the procedural fairness principle in administrative law refers to the right to be heard and the rule against bias. He argues that bias will probably not be an issue in the case of deprivations caused by legislation.[89] The reason for this is that the rule against bias is addressed by the law of general application requirement in section 25(1). There are, nonetheless, instances where the right to be heard can raise issues of procedural fairness when deprivations are imposed by legislation.[90] For example, such an instance

[86] Van der Walt AJ *Constitutional property law* 3 ed (2011) 269.

[87] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267.

[88] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267

[89] Van der Walt AJ *Constitutional property law* 3 ed (2011) 269-270.

[90] Van der Walt AJ *Constitutional property law* 3 ed (2011) 270. Van der Walt argues that one such an instance is where the deprivation will only be procedurally fair if the property owners are permitted to assert their rights in court. Van der Walt cites the following cases in support of his argument: *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) and *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC).

would be where the deprivation is procedurally arbitrary because the legislative scheme does not include a review procedure that would assuage the burden placed on the owner.[91]

Finally, before a court can proceed to determine whether a deprivation is substantively or procedurally arbitrary or procedurally unfair, it must first determine whether the deprivation was actually authorised by the law of general application. Van der Walt explains that when determining the constitutional validity of a deprivation, the courts fail to enquire whether a specific interference with property rights is in fact authorised by legislation.[92] He argues that the first question should always be: does the law of general application authorise the specific interference with property rights? If the answer to this question is negative, the deprivation will be unlawful and unconstitutional.[93] A court may only proceed to determine whether deprivations are either substantively or procedurally arbitrary or procedurally unfair if it decides that the law of general application does in fact authorise such deprivations.[94] Van der Walt further explains that this approach accords with the principle of subsidiarity, which

[91] Van der Walt AJ *Constitutional property law* 3 ed (2011) 270. Van der Walt argues that O' Regan J's dissenting judgment in *Reflect-All 1025 CC v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC), could also be interpreted along these lines even though she concluded that the deprivation was substantively arbitrary.

[92] Van der Walt AJ *Constitutional property law* 3 ed (2011) 235-237.

[93] Van der Walt AJ *Constitutional property law* 3 ed (2011) 236.

[94] Van der Walt AJ *Constitutional property law* 3 ed (2011) 236. Van der Walt illustrates his argument with reference to *Growthpoint Properties Ltd v SA Commercial Catering and Allied Workers Union and others* [2010] ZAKZDHC 38 (3 September 2010). In that case the court had to determine whether strike action caused an arbitrary deprivation of the applicant's property. The court decided that it was necessary to balance the applicant's section 25(1) rights with the picketers' right to assembly and demonstration embodied in section 17 of the Constitution. Van der Walt argues that instead of balancing two constitutional rights the court should rather have determined whether the Labour Relations Act 66 of 1995 (LRA) enabled the strikers to act in a manner that would result in the arbitrary deprivation of property. The LRA did not allow the strikers to act in a way that would unreasonably interfere with property rights. This meant that the strikers' actions were unlawful and that it was not necessary for the court to determine whether there was an arbitrary deprivation of property.

requires a litigant to rely on legislation that gives effect to a constitutional right, instead of directly relying on that constitutional right.[95]

To summarise, deprivations are the statutory interference with the owner's use, enjoyment and exploitation of his property rights for a public purpose. *FNB* has made it explicit that to pass constitutional muster, deprivations must be imposed by law of general application and they may not be arbitrary. An enquiry into the constitutional validity of a deprivation comprises of four stages. Firstly, one must determine whether there is law of general application that authorises the particular deprivation. If the answer to this question is negative, the deprivation is unlawful and unconstitutional. However, one can proceed to the second stage of the enquiry if the specific interference with property rights is in fact authorised by law of general application. Secondly, it is necessary to determine whether the deprivation is substantively arbitrary. More specifically, one must apply the eight contextual factors which constitute the *FNB* non-arbitrariness test to determine whether the law of general application provides sufficient reason for the deprivation. Thirdly, one must determine whether the deprivation is either procedurally arbitrary for purposes of section 25(1) or procedurally unfair on the basis of PAJA. At this stage, it is therefore essential to determine whether the deprivation is caused by legislation or, alternatively, by administrative action. On the one hand, a deprivation caused by legislation will be procedurally arbitrary in terms of section 25(1) if – 'judged according to the same principles that apply in administrative law under PAJA'[96] – it is imposed by legislation in a procedurally unfair manner. Van der Walt holds the view that such deprivations are uncommon but they can, for example, arise where – as in *Reflect-All* – the legislative scheme does not include a review procedure that would ameliorate the burden placed on the owner. On the other hand, a procedurally unfair deprivation caused by administrative action should be assessed in light of section 33 of the Constitution, PAJA and, where applicable, the authorising legislation. Finally, there may be instances where a litigant will have a choice of remedies because the deprivation caused by administrative action is substantively

[95] Van der Walt AJ *Constitutional property law* 3 ed (2011) 236. Van der Walt explains that a litigant can rely on the constitutional right directly if the wants to attack the constitutional validity of the legislation.

[96] Van der Walt AJ *Constitutional property law* 3 ed (2011) 267.

arbitrary as well as procedurally unfair. A litigant will, in such an instance, be able to argue his case on the basis of section 25(1) or on the basis of PAJA and section 33 of the Constitution. Van der Walt suggests that section 25(1) might be the preferred line of attack if a deprivation is substantively arbitrary because of the impact of the administrative action on the property owner. Alternatively, a litigant ought to rely on PAJA or the authorising law if the deprivation is arbitrary because of some procedural irregularity (or shortcoming) or because of the manner in which the administrative discretion is exercised.

The purpose of this chapter is to determine what type of deprivations, if any, are imposed on land owners when they are compelled to demolish their unlawful and illegal buildings. This chapter also considers the nature of the deprivations imposed on neighbouring land owners when illegal and unlawful buildings are not demolished. Furthermore, with reference to historic preservation and unlawfully occupied buildings, this chapter determines the types of deprivations imposed on land owners and other property right holders by the regulatory denial of an owner's wish to demolish buildings on his land.

The sections below firstly indicate the instances where the deprivations (in each of these categories) do not raise constitutional issues because the specific interferences with property rights are not authorised by the relevant laws of general application. Secondly, the chapter delineates the instances where these deprivations are substantively arbitrary as proscribed by section 25(1) of the Constitution. Thirdly, this chapter draws a distinction between deprivations caused by administrative action or by legislation to determine whether these interferences with property rights are either procedurally arbitrary or procedurally unfair. Finally, this chapter determines when a litigant will have a cause of action either on the basis of section 25(1) or on the basis of PAJA. In such instances it is necessary to ascertain on which basis the litigant will have the strongest case. There are circumstances where it would clearly benefit the litigant to assert his rights on the basis of section 25(1), instead of PAJA and section 33(1). This would be where section 25(1) provides a more compelling case; where there is a shortcoming in PAJA; or where PAJA is vague and unclear. Naturally, there are also instances where section 33(1) and PAJA provide a more persuasive line of attack.

Finally, as this chapter advances, it will become clearer when – because of the operation of the principle of subsidiarity – a litigant will first have to rely on the remedies provided for in authorising legislation prior to asserting his rights on the basis of section 25(1) or PAJA.

To aid the discussion, each section in the chapter identifies a series of constitutional issues relevant in the context of illegal and unlawful buildings, heritage preservation and unlawfully occupied buildings. Although some of these issues have been touched upon in the courts, they have not necessarily been resolved. Other issues, especially those raised in relation to conditions of title and unlawful and illegal buildings, have not been addressed by the courts yet.

5 2 The demolition of unlawful and illegal buildings

5 2 1 Introduction

Chapter 3 distinguished between the demolition of buildings affected by restrictive conditions, illegal buildings and buildings that were either wholly or partially completed when the building plans were set aside on review. Each of the sections showed that the courts are prepared to order the demolition of structures that conflict with existing rights or that do not comply with legislation. A demolition order in these instances has a multitude of functions. For example, when the court orders the demolition of a building, it compels the local authority to enforce legislation such as the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act). A demolition order is also the most effective way in which the rights of neighbours can be protected. The court further upholds the public interest in the strict enforcement of the law, the orderly and harmonious development of urban areas and the conservation of the environment.

The constitutional analysis in this section is centred on the rights of two groups of litigants, namely property owners and neighbouring property owners in the broad

sense.[97] Specifically, group one comprises of owners who face the demolition of their structures because their buildings are illegal or unlawful. A building is unlawful when it is constructed in disregard of the property rights of others, for example the limited real rights created by restrictive conditions. Illegal buildings refer to structures that were built without approved building plans, as was the case in *City of Tshwane v Ghani*[98] and in *Barnett and others v Minister of Land Affairs and others*.[99] The courts have further confirmed that a structure will be illegal in instances where building plans are set aside on review.[100] Structures can also, for example, be illegal because they were built in conflict with other laws such as environmental regulations, zoning schemes and the ordinances. Group two consists of neighbouring land owners, whose rights are protected by the demolition of unlawful or illegal structures.[101]

This section firstly determines whether the owners in group one possess constitutional property interests in illegal structures and, secondly, whether they will be unconstitutionally deprived of their rights if their illegal buildings are demolished against their will. The section further argues that the right of neighbouring land owners to insist that the local authorities enforce compliance with legislation amounts to a constitutional property interest. Neighbouring property owners are deprived of this right when the local authority approves building plans in conflict with legislation, conditions of title or restrictive covenants or when the authorities refuse to enforce legislation or building plans. They are further deprived of their constitutional property rights when the local authority fails to demolish an illegal building. The section below determines whether these deprivations are unlawful and therefore unconstitutional. This section also considers the issues of substantive arbitrariness and of procedural fairness. Where necessary, the section indicates when neighbouring land owners will have to assert

[97] Neighbouring property owners in the broad sense refers to immediate neighbours and to other property owners in a township. See the explanation of 'neighbouring property owners' in chapter 3, section 3 1 above.

[98] 2009 (5) SA 563 (T).

[99] 2007 (6) SA 313 (SCA).

[100] *Searle v Mossel Bay Municipality and others* [2009] ZAWCHC 9 (12 February 2009) para 10.

[101] See the distinction drawn between unlawful and illegal buildings in chapter 3, section 3 1 above.

their rights on the basis of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), or the Building Standards Act, instead of relying on their right to just administrative action as embodied in section 33 of the Constitution directly or on their section 25(1) rights.

5 2 2 Land owners

This section aims to show that most land owners will not be unconstitutionally deprived of property in circumstances where their illegal buildings are demolished. Case law has on more than one occasion confirmed that building and development regulation is a valid exercise of the state's police power. With reference to these cases, it is argued below that land owners will generally find it difficult to prove that they have constitutional property interests in structures that they did not have the right to build in the first place. This means that these owners will be unable to argue that the subsequent demolition of their structures amounts to an arbitrary or procedurally unfair deprivation of their property. The argument is supported by the decision in *Standard Bank of South Africa Limited v The Swartland Municipality* (*Swartland Municipality*),[102] where the court held that a mortgagee does not have a proprietary interest in an illegal structure. The section further relies on *Camps Bay Ratepayers and Resident's Association v Harrison*[103] to show that, in a very specific set of circumstances, there may be instances where the demolition of an illegal building or building works will result in a substantively arbitrary deprivation of other legal property interests. This exceptional case should be distinguished from cases such as *City of Tshwane v Ghani*[104] and *Barnett and others v Minister of Land Affairs and others*,[105] where the owners do not have property interests worthy of section 25 protection.

Case law has confirmed that the police power principle has been accepted into South African law. Van der Walt explains that 'police power' refers to the power of the

[102] [2010] ZAWCHC 103 (31 May 2010).

[103] [2010] ZASCA 3 (17 February 2010).

[104] 2009 (5) SA 563 (T).

[105] 2007 (6) SA 313 (SCA).

state to regulate land-use planning, development, building and the conservation of the environment in the public interest.[106] Limitations imposed on ownership by regulatory controls will generally be constitutional, provided they are properly authorised, in line with the rules of procedural fairness and not arbitrary.[107] For example, in *Nyangane v Stadsraad van Potchefstroom*,[108] the court held that it is accepted in a 'modern system of law' that the local authority has the power to impose conditions of title to ensure the 'co-ordinated and harmonious development and town-planning within their areas of administration' and therefore the exercise of such powers is not *per se* unconstitutional.[109] Likewise, in *Muller NO and others v City of Cape Town*,[110] the court confirmed that ownership is not an absolute right and that it is subject to the restrictions imposed on it by statute and common law.[111] More recently, in *PJ Ruck v Makana Municipality*,[112] the court explained that property rights often clash with what is in the broader public interest.[113] The purpose of regulatory laws is to manage this tension between property rights and the public interest and further 'to lay the foundation for uniform, orderly and harmonious development and growth'.[114] This in turn will promote certainty, which is 'crucial' to informing 'the content of the right of ownership'.[115] Collectively, these cases indicate that ownership is not an absolute right and that it must

[106] Van der Walt AJ 'Constitutional property law' 2008 *ASSAL* 231-264 at 240.

[107] Van der Walt AJ 'Constitutional property law' 2008 *ASSAL* 231-264 at 240.

[108] 1998 (2) BCLR 148 (T).

[109] 1998 (2) BCLR 148 (T) 160-161.

[110] 2006 (5) SA 415 (C).

[111] 2006 (5) SA 415 (C) paras 72-73.

[112] [2010] ZAECGHC 111 (24 November 2010).

[113] [2010] ZAECGHC 111 (24 November 2010) para 20.

[114] [2010] ZAECGHC 111 (24 November 2010) para 20.

[115] [2010] ZAECGHC 111 (24 November 2010) para 20.

yield to the statutory limitations that are imposed in the public interest.[116] Viewed from this perspective, one can argue that an owner will not have a constitutional property interest in an illegal structure, which he did not have the right to build. This argument is supported by the *Swartland Municipality*[117] decision, where the court decided that a mortgagee (or any other person or institution that holds a real right in the property), does not have a proprietary interest in illegal structures built on the property of the mortgagor. The court explained that 'the doctrine of *jus in re aliena* does not protect the applicant from the demolition of the unauthorised and illegal structures, which

[116] Visser DP 'The absoluteness of ownership: the South African common law perspective' 1985 *Acta Juridica* 39-52 at 43-48 explains that Roman-Dutch law did not incorporate the notion that ownership is an absolute right. Ownership in the Roman-Dutch context has always been a fundamentally restricted right. Visser describes some of the restrictions originally placed on ownership, including limitation of the owner's right to alienate property. Furthermore, the various remedies granted to adjacent land owners in the context of neighbour law indicate that ownership was a non-absolute construct. The concept of absoluteness was introduced into South African law by the courts that relied on the work of the nineteenth century Pandectists. Visser argues that this notion of absoluteness is rooted in nineteenth century Germany rather than seventeenth and eighteenth century Holland and that it should never have been transplanted into South African law. By contrast, Lewis C 'The modern concept of the ownership of land' 1985 *Acta Juridica* 241-266 at 242 argues that ownership has been eroded by the limitations imposed by legislation. She argues that in a modern society, ownership is a 'paltry right so whittled away by legislation in the past century that it cannot be equated with the ownership of classical Roman law or even the right as it was envisaged by the Roman-Dutch writers'. The central premise of Lewis's article is that ownership entitlements, and particularly the right to use property, has been transformed by political, social and economic forces. Limitations imposed on ownership for social reasons include town-planning and health and safety regulation. These limitations are imposed in the public interest and they have transformed ownership into a restricted right. Van der Walt AJ 'The effect of environmental measures on the concept of landownership' (1987) 104 *SALJ* 469-479 at 469 and 479 describes a range of statutory limitations imposed on ownership for purposes of protecting the natural and built-up environment in South Africa. Van der Walt argues that these limitations can indicate that 'ownership, and especially landownership, is in principle and *ab initio* of a limited nature'. Viewed from this perspective he argues that limitations such as those imposed by environmental conservation measures 'should not be seen as inroads into or limitations of the owner's theoretically unlimited right but as natural duties and limits inherent in ownership of land as such'.

[117] [2010] ZAWCHC 103 (31 May 2010).

fortuitously became part of its security'.[118] The implication is that the demolition of the illegal structures would not have impacted on the mortgagee's legal property interests. Accordingly, the decision did not raise a section 25(1) issue. Explained differently, the mortgagee did not have a proprietary interest in the illegal structure built on the property. However, the mortgagee did have legal interests in the land, but these interests would not have been affected by the demolition of the illegal structure. As a result, it could not be said that the subsequent demolition of the illegal structure would have deprived the mortgagee of legal interests that it held in relation to the land.[119] Essentially, this decision makes it explicit that a land owner and holders of limited real rights will not have a property interest – and by implication a constitutional property interest – in an illegal building. Land owners will therefore be unable to argue that the subsequent demolition of illegal buildings amounts to a deprivation of constitutional property interests, which they possess in relation to those illegal structures.

Furthermore, a land owner can evidently not have a constitutional property interest in a structure that interferes with the property rights of others. This means that land owners do not have the right to build on their land in a way that conflicts with the property rights of other land owners. A land owner has the responsibility to exercise his

[118] [2010] ZAWCHC 103 (31 May 2010) para 16.

[119] This point can also be explained with reference to the well known *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2010 (1) SA 333 (SCA) (*Oudekraal*). In *Oudekraal* the court had to decide whether it would set aside the administrator's decision to allow certain developments on the property. The decision to allow township development had been taken thirty years previously at a time when the administrator was unaware of sacred Muslim graves situated on the land. Moreover, it was later determined that the land was environmentally sensitive and home to unique fauna and flora. The court decided that despite the unprecedented delay it could set aside the decision to allow development because of the range of interests that would be negatively affected by development. Arguably, the land owner would have been in the same position as the mortgagee in *Swartland Municipality* had it proceeded to develop the land even though the administrator's approval had been set aside. Any structures erected by the *Oudekraal* owner, which conflicted with the Supreme Court of Appeal's decision, would have been illegal. The subsequent demolition of the illegal structures would not have impacted on the *Oudekraal* land owner's legal property interests, namely his ownership of the land. As a result, the demolition of the illegal structures would not have activated a section 25(1) enquiry because demolition would not have affected the land owner's legal property interests in any way.

ownership entitlements in accordance with the law and in a manner that does not infringe on the property rights of others. This implies that if a structure conflicts with conditions of title or restrictive covenants in favour of others, a land owner cannot argue that the subsequent demolition of the structure on his land amounts to a deprivation of his property.[120] In addition to being creatures of statute, restrictive conditions constitute limited real rights *sui generis*,[121] which create mutual and reciprocal obligations for all the land owners in the township.[122] Restrictive covenants differ from conditions of title in the sense that they are created in terms of a contract between the township developer and the original owners of the properties in a township.[123] Registration against the title deeds of the servient properties nevertheless converts these contractual rights into limited real rights *sui generis*, which bind all subsequent owners of those properties.[124]

However, there are instances where the demolition of illegal structures will negatively impact on the land owner's other legal interests, for example, the legal parts of a specific structure. Explained differently, there are circumstances where the demolition of illegal structures will result in a deprivation of legal property interests such as legal buildings or building works. In these cases it is necessary to conduct a section 25(1) enquiry to establish whether – in the words of *FNB* – there is sufficient reason for

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[120] Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 40-41 argues that the limitations imposed on ownership by building regulations are constitutionally valid provided they are authorised by the law of general application and as long as there is a sufficiently strong link between the deprivation and the purpose of the law. This means that the demolition of the illegal building will not, as a rule, be unconstitutional. The reason for this is that the builder had contravened legitimate laws, such as the Building Standards Act, which fulfils an important function in society. Van der Walt argues that it is desirable that the law be strictly enforced even if it results in great losses for the land owner.

[121] Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 288.

[122] Pienaar JM *Die regsaard van beperkende en dorpstigtingsvoorwaardes* LLM Thesis PU for CHE (1990) 37.

[123] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* LLD Thesis Unisa (1990) 111. See the discussion in chapter 3 section 3 2 1 above.

[124] Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* LLD Thesis Unisa (1990) 111.

such a deprivation.[125] If there is insufficient reason for such a deprivation, it will be substantively arbitrary and will therefore be in conflict with section 25(1). A prime example of such an instance is *Camps Bay Ratepayers and Resident's Association v Harrison* (*Camps Bay*),[126] where the Supreme Court of Appeal refused to set aside the respondent's building plans despite the fact that they had been approved in breach of zoning scheme regulations.[127] This meant that the appellants could not obtain a demolition order, even though the respondent's building was at least partially illegal. One can argue that by refusing to set aside the building plans, the court protected the proprietary interests – and by implication the constitutional property rights – of the respondent in the legal parts of her building. Furthermore, one can argue that in this case there would have been insufficient reason to justify the demolition of the legal parts

[125] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[126] [2010] ZASCA 3 (17 February 2010).

[127] [2010] ZASCA 3 (17 February 2010) paras 52 and 62. More specifically, the court had to decide whether it would condone the three year delay in bringing the alleged zoning scheme contraventions to the attention of the court. The court held it would not condone the delay and that it would not set aside the respondent's building plans.

of the respondent's building.[128] This is illustrated with reference to the factors that influenced the court to conclude that it would have been unjust to require the respondent to demolish her building insofar as it contravened the zoning scheme. Particularly, the court considered the fact that the litigation between the parties had been continuing for three years before the appellants raised the issue of the zoning scheme infraction. The court also established that the respondent had unintentionally built over the building line, as was proscribed by the zoning scheme. Moreover, the local authority confirmed that her infraction was relatively minor, and that it would not pose a threat to the health and safety of the public, or impact on the character of the area and it would also not interfere with the rights of other land owners in the township.[129] What is more, the respondent's infraction was so minor that it had gone unnoticed for three years. Finally, the respondent would have had to incur considerable costs to bring her sizeable building in line with the zoning scheme if her building plans were to be set aside on review. These expenses, together with the litigation costs over the years, would have placed an immense financial burden on the respondent.[130]

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[128] At this stage it is necessary to retrace the steps of the *FNB* methodology (described in section 5 1 2 above) insofar as it applies to *Camps Bay Ratepayers and Resident's Association v Harrison* [2010] ZASCA 3 (17 February 2010) (*Camps Bay*). The first step in the *FNB* methodology is to determine whether there is actually a property interest that will be affected. Clearly, the property interest affected in *Camps Bay* is the legal aspects of the building, which might be partially or completely destroyed when the illegal aspects of the structure are demolished. Secondly, it is imperative to ascertain whether the land owner would actually be deprived of her property interests. It is evident that the complete or partial destruction of legal buildings or building works in *Camps Bay* will constitute a 'deprivation' for purposes of a section 25(1) enquiry. Thirdly, one must determine whether the deprivation meets the requirements of section 25(1), namely law of general application and non-arbitrariness. The law of general application in this instance would have been the section 21 of the National Building Standards and Building Regulations Act 103 of 1977 (the Building Standards Act), which authorises the local authority to apply to the court for a demolition order for an illegal structure. As a result, the law of general application requirement would have been met because the local authority would have acted in accordance with the Building Standards Act. Importantly, the deprivation is brought about by administrative action (the local authority's decision to apply for a demolition order) and not by the legislation itself.

[129] [2010] ZASCA 3 (17 February 2010) para 62.

[130] [2010] ZASCA 3 (17 February 2010) para 62.

These factors suggest that the setting aside of the building plans and the subsequent partial demolition of the building would have amounted to a substantively arbitrary deprivation of the respondent's property. The relationship between the deprivation (the complete or partial demolition of her legal buildings and building works) and the ends sought to achieve (protection of the rights of other land owners, public health and safety and preservation of the character of the area) was practically non-existent. Clearly, the demolition of the legal parts of the building – in an attempt to bring the illegal component of the building in line with the zoning scheme – would have served no real purpose. The court had established that the illegal aspect of the building was so slight that it did not impact in any profound way on the property rights of other land owners or on the health and safety interests of the public in general. Furthermore, the illegal building works did not disfigure the *Camps Bay* area. As a result, the traditional interests that would usually have been advanced by the demolition of an illegal structure had fallen away.

The respondent had constructed a partially illegal building which, under the circumstances, did not have any real negative consequences for neighbouring land owners and the public in general. Therefore, it could not be a said that there was a particularly strong relationship between the purpose of the deprivation and the respondent because demolition, in this instance, would have served no function. Contrastingly, the strict enforcement of the law by way of a demolition order would have had dire consequences for the respondent. The respondent would, at great expense, have been compelled to demolish the illegal as well as some legal aspects of her building. In addition to the delay brought about by the litigation proceedings over the years, demolition would have caused the land owner to further postpone the development of her land. As stated above, these interferences with property rights did not really further the goal of safe, healthy and aesthetically pleasing urban areas. Moreover, the demolition would not have provided further protection to the rights of other land owners, because these rights were not really affected in any material way. Accordingly, the relationship between the purpose of the deprivation, the nature of the property and the extent of the deprivation is rather weak. One the one hand, demolition of the illegal (and by implication legal) aspects of the building would not have better

protected the range of interests mentioned above. It would on the other hand, have severely burdened the owner who, in addition to the legal costs already incurred, had to bear the financial burden of the destruction of legal parts of her building. Furthermore, the strict enforcement of the zoning scheme in this case was not a compelling enough reason to justify the demolition of legal buildings and building works, especially if one considers that the illegality of the structure had gone unnoticed for three years. Admittedly, the demolition would not have embraced all the incidents of the respondent's ownership since she would have been able to sell the plot of land. That being said, it was unclear whether the value of the land would have offset the financial burden of the litigation costs and the demolition of the legal aspects of her building.

Collectively, these considerations, coupled with the delay aspect of the dispute, show that there is a disproportionate relationship between the deprivation (demolition of legal building works) and the purpose it seeks to achieve, namely the protection of the rights of others, the preservation of the character of the area and public health and safety. These interests were not threatened by the respondent's infraction of the zoning scheme. It was, therefore, unnecessary to protect these interests by requiring the demolition of illegal and legal aspects of the respondent's structure. Evidently, there would have been insufficient reason to justify the partial demolition of the respondent's building, considering the circumstances, the limited extent and impact of the illegality and the potentially excessive effects of enforcement. This means that a demolition order would have resulted in a substantively arbitrary deprivation of the respondent's property.

Decisions such as *Camps Bay* and *Swartland Municipality* differs from other illegal building cases such as *City of Tshwane v Ghani* (*City of Tshwane v Ghani*)[131] and *Barnett and others v Minister of Land Affairs and others* (*Barnett*)[132] because in the case of the former, the land owner and mortgagee respectively had legal interests worthy of section 25(1) protection. In the case of the latter, the illegal builders had no legal interests that would be affected by demolition. More precisely, the mortgagee in *Swartland Municipality* had a legal interest in the land. As explained above, this case did

[131] 2009 (5) SA 563 (T).

[132] 2007 (6) SA 313 (SCA).

not raise a section 25(1) issue because the demolition of the illegal structure did not impact on the mortgagee's legal interests. Likewise, the land owner in *Camps Bay* had a legal interest in her land as well as in those parts of her building which complied with the law. The *Camps Bay* decision raised a section 25(1) issue because the demolition of the illegal building works would have far-reaching consequences for her legal property interests, in particular the legal parts of her building.

In *City of Tshwane v Ghani* and *Barnett* the structures were built without approved building plans – as required by section 4 of the Building Standards Act – and in blatant disregard of health, safety and environmental legislation. In both cases, the illegal builders also attempted to appropriate land by building the structures on plots which they did not own. The illegal builders in *City of Tswane v Ghani* and *Barnett* would undoubtedly have had no legal interests (and by implication constitutional property interests) that would potentially have been affected by the demolition of the illegal structures. These decisions did not raise a section 25(1) issue because the illegal builders did not possess legal property interests worthy of constitutional protection. As a result, the illegal builders would not have been able to argue that the demolition of their illegal structures amounted to a potentially arbitrary deprivation of their property interests. In fact, demolition may have been the only effective way to protect the constitutional property interests of others, such as the owners of the land. Furthermore, demolition may have been the only effective way in which the court could have upheld the interests of the neighbouring land owners and the public in general.[133]

Camps Bay shows that regulatory laws cannot be applied rigidly and that it is necessary for a court to consider the unique circumstances of each case. The circumstances, assessed within the framework of the *FNB* substantive arbitrariness test, indicate when the rigid enforcement of the law leads to unjust and unconstitutional results. *Camps Bay* remains, however, an exceptional case and there is no clear indication of when the court will refrain from ordering the demolition of illegal structures, as a measure to protect land owners' constitutional property interests in their land and

[133] As explained in chapter 3, section 3 3 2 above, these illegal buildings had a negative impact on the environment and posed a health and safety risk to neighbouring land owners and the public in general.

legal buildings situated on the property. Whether or not the court will be willing to protect the land owner's constitutional property interest depends on the case-specific factors and circumstances relevant to the dispute.

Camps Bay suggests that a range of factors will be relevant in a section 25(1) balancing enquiry (substantive arbitrariness test). These factors include: the seriousness of the infraction; whether the land owner had acted in bad faith; the impact of the infraction on the rights of others and the character of the neighbourhood; whether the illegal building poses a health and safety risk to the public and whether the illegal building operations are detrimental to the environment. This is not a closed list and any other relevant circumstance may have an impact on the court's finding. The court in *Camps Bay* might, for example, have been more willing to set aside the respondent's building plans if the building conflicted with conditions of title or restrictive covenants in favour of neighbouring land owners. As explained above, conditions of title and restrictive covenants amount to limited real rights and there would have to be more compelling circumstances to justify interference with these rights. Nevertheless, one cannot exclude the possibility that there will be exceptional instances where an illegal building would be permitted to stand even though it is incompatible with conditions of title. Such an instance could be where the land owner had built in conflict with a condition of title which the court finds is obsolete.

The other pivotal factor in the *Camps Bay* was the fact that the appellants had delayed in raising the issue of the respondent's breach of the zoning scheme. This factor, in combination with the other circumstances, influenced the court to find in the favour of the respondent. The issue of delay also played a central role in the series of *Oudekraal* cases.[134] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*,[135] the Supreme Court of Appeal had to decide whether a 30 year delay precluded it from setting aside the administrator's decision to allow the establishment of a township on

[134] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2002 (6) SA 573 (C); *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) and *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2010 (1) SA 333 (SCA).

[135] 2010 (1) SA 333 (SCA).

the appellant's property.[136] The court held that the administrator's decision was invalid because it was taken at a time when he was unaware of sacred Muslim graves that would have been destroyed in the course of development.[137] The court explained that the degree of delay in this case was unprecedented, but there were also other exceptional circumstances which justified the setting aside of the administrator's decision.[138] More specifically, the entire area on which the development would have taken place was regarded as holy by the Muslim community.[139] There was also uncertainty as to how many undiscovered graves would have been destroyed by development. Moreover, the property formed part of an ecologically sensitive area and it was home to rare species of fauna and flora that formed a unique biodiversity complex.[140] These policy considerations persuaded the court to set aside the administrator's decision. In this regard the court explained:

> '[i]t appears to me that, in the totality of the circumstances referred to above, to incline in favour of the respondents would be to exercise a discretion so as to promote the spirit, purport and the object of the Bill of Rights. In the circumstances of this case, by ensuring that an invalid decision does not stand, the principle of legality and the interests of justice will be advanced'.[141]

Evidently, the development of the *Oudekraal* property would have had a significant impact not only on the interests of the Muslim community, but also on the public interest in the preservation of the environment. These interests outweighed the owner's right to proceed with the development. Furthermore, the unique circumstances of the case placed an additional obligation on the owner, namely the duty to develop his property in a manner that would uphold the Muslim community's interest in the preservation of sacred religious sites as well as the public interest in the preservation of the inimitable environment. Like *Camps Bay*, the *Oudekraal* decision confirms that the case-specific

[136] 2010 (1) SA 333 (SCA) para 58.

[137] 2010 (1) SA 333 (SCA) para 25.

[138] 2010 (1) SA 333 (SCA) para 79.

[139] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) paras 14-17 and *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2010 (1) SA 333 (SCA) para 70.

[140] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2010 (1) SA 333 (SCA) paras 3-8.

[141] 2010 (1) SA 333 (SCA) para 82.

circumstances will impact on the way in which the courts apply the law. The policy considerations in *Oudekraal* influenced the court to uphold the principle of legality and to set aside the invalid administrative action.

In conclusion, legislation such as building and development or environmental conservation laws can drastically limit the owner's right to use his land. One such a limitation is that the owner can only build on his property in accordance with the requirements set in legislation. Buildings will be illegal if they conflict with these laws or if they are built in accordance with building plans that are set aside on review. Generally, an owner does not have a property interest, and by implication a constitutional property interest, in an illegal structure. This implies that the subsequent demolition of the structure will not amount to a deprivation of property. The reason for this is that the right to build a structure in conflict with the law does not form part of the owner's entitlements in relation to his property. This argument is supported by the *Swartland Municipality* case, where the court confirmed that a mortgagee does not have a proprietary interest in an illegal structure which fortuitously became part of its security. However, *Camps Bay* illustrated that there are instances where the law cannot be applied inflexibly, and where the courts will protect the owner's legitimate proprietary interests in deciding whether demolition of the illegal structure would be justified, considering all the circumstances. Essentially, the *FNB* substantive arbitrariness test enables one to determine when the demolition of an illegal building or building works will amount to an arbitrary deprivation of property to the extent that demolition imposes an unjustifiably excessive burden on the affected owner's legitimate property interests in the land and in legal parts of the building. More specifically, the *FNB* non-arbitrariness test requires consideration of the complexity of the relationships relevant in the dispute. This test also directs one to balance the opposing interests of the affected land owner, neighbours and the public in general. The *Camps Bay* example showed that there would have been insufficient reason for the deprivation (demolition) because there was a disproportionate relationship between the purpose of the deprivation (public health and safety and the protecting of neighbouring land owners' interests) and the demolition of the illegal building works. The reason for this was that the illegal structures had little bearing on the interests of the public or neighbouring land owners while demolition

would have deprived the land owner of most if not all of the legal aspects of her building. Furthermore, the delay element of the dispute contributed in part to the conclusion that demolition would have amounted to an excessive interference with property rights.

A range of factors can influence the court's decision to protect the owner's legitimate property interests by not allowing demolition of the illegal structure. *Oudekraal* shows that a decisive factor (such as delay) in one instance can be less important in another context. *Oudekraal*, like *Camps Bay*, demonstrates that policy considerations and other factors will impact on the court's application of the law. The relevant factors in *Oudekraal* influenced the court to set aside the invalid administrative action despite the fact that the decision had been permitted to stand for an unprecedented 30 year period. In doing so, the court upheld the principle of legality and it protected the various interests that would have been affected by the development.

5 2 3 Neighbouring land owners

5 2 3 1 Introduction: constitutional property interests

The purpose of this section is to determine whether neighbouring land owners are unconstitutionally deprived of property in circumstances where local authorities fail to demolish illegal or unlawful buildings. One must, therefore, first determine whether the limited real rights created by conditions of title and restrictive covenants amount to constitutional property.

Chapter 3 showed that the courts initially classified conditions of title as praedial servitudes, which create reciprocal rights and obligations for property owners in a specific township upon registration. Academic authors hold divergent views as to the exact nature of conditions of title and restrictive covenants. Van der Merwe[142] reasons that restrictive conditions (including restrictive covenants as well as conditions of title) are unique servitudes; Van Wyk convincingly argues that conditions of title and

[142] Van der Merwe CG *Sakereg* 2 ed (1989) 501.

restrictive covenants are not servitudes but limited real rights *sui generis*.[143] It is nonetheless clear that restrictive conditions create limited real rights, regardless of whether they are classified as servitudes or not.[144] Restrictive conditions, created by legislation, become limited real rights *sui generis* once registered against the title deeds of properties.[145] Similarly, restrictive covenants will constitute limited real rights *sui generis* once they have been registered against the title deeds of the specific properties.[146] Recently, in *Ex Parte Optimal Property Solutions CC*,[147] the court confirmed that registered praedial servitutal rights, including registered conditions of title and restrictive covenants, are constitutional property for purposes of section 25(1) of the Constitution.

When conditions of title or restrictive covenants are not relevant to the dispute, one would have to establish whether the right of neighbouring land owners to insist that local authorities enforce compliance with legislation (such as the zoning scheme or the Building Standards Act) will constitute property rights for purposes of section 25. Arguably, the right of neighbours to enforce compliance with legislation (such as the Building Standards Act) amounts to constitutional property worthy of section 25(1) protection. Case law has confirmed that neighbouring land owners have the right to insist that other owners in the area respect their rights and adhere to statutory limitations when developing their properties. For example, in *Muller NO and others v City of Cape Town* (*Muller*),[148] the court explained that an owner has the right to develop his property to any permissible optimal level. The owner is, however, still

[143] Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 288.

[144] Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* 5 ed (2006) 321 explain that servitudes are limited real rights.

[145] Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 288.

[146] Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 288.

[147] 2003 (2) SA 136 (C) para 19.

[148] 2006 (5) SA 415 (C).

subject to the limitations imposed on him by legislation.[149] Neighbouring land owners have a right to insist that statutory restrictions are adhered to, 'inclusive of a right not to have plans passed in respect of an adjoining property in circumstances where the statute prohibits the passing of such plans'.[150] The court also explained that a property owner does not have the right to use his property in a manner that conflicts with law or that 'adversely affects the rights of owners of adjoining or neighbouring properties'.[151]

Similarly, *Walele v City of Cape Town and others* (*Walele*)[152] confirmed that the local authorities and the courts should, within the framework of the Building Standards Act, maintain a balance between the rights of property owners to build on their land on the one hand and the rights of neighbouring property owners on the other hand.[153] Moreover, the courts have in a series of cases held that neighbouring land owners, and voluntary associations acting on behalf of neighbouring land owners, have the *locus*

[149] 2006 (5) SA 415 (C) paras 72-73.

[150] 2006 (5) SA 415 (C) paras 72-73 with reference to *Paola v Jeeva NO and others* 2004 (1) SA 396 (SCA) para 19.

[151] 2006 (5) SA 415 (C) para 74.

[152] 2008 (6) SA 129 (CC).

[153] See further *Odendaal v Eastern Metropolitan Local Council* 1999 CLR 77 (W) 84 where the court explained that when approving building plans local authorities are required to protect the interests of property owners in the areas of their jurisdiction.

standi to force local authorities and other land owners to abide by building and development legislation.[154]

In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* (the *First Certification* case),[155] the Constitutional Court confirmed that there was no universally recognised formulation for the right to property.[156] The court stated that it would be unwise to ascribe a comprehensive meaning to the concept of property as intended in section 25(1) of the Constitution.[157] Van der Walt notes that most commentators believe that the property concept will be interpreted generously for constitutional purposes.[158] With reference to

[154] Van der Walt AJ *The law of neighbours* (2010) 341-342. Van der Walt refers to *Erf 167 Orchards CC v Greater Johannesburg Metropolitan Council Johannesburg Administration and another* 1999 CLR 91 (W) and *PS Booksellers (Pty) Ltd and another v Harrison and others* 2008 (3) SA 633 (C) para 19, where the court confirmed the standing of a voluntary association to enforce compliance with conditions of title as well as the zoning scheme on behalf of property owners in the township. See also *Chairperson, Walmer Estates Residents Community Forum and another v City of Cape Town and others* 2009 (2) SA 175 (C) para 21, where the court explained that neighbouring owners have a right to insist that adjoining property owners comply with the zoning scheme. Furthermore, neighbouring land owners have a right to insist the neighbours building plans are not approved unless they comply with the provisions of the Building Standards Act. Van der Walt further cites *Tergniet and Toekoms Action Group and 34 others v Outeniqua Kreosootpale (Pty) Ltd and others* [2009] ZAWCHC 6 (23 January 2009) para 22, where the court confirmed the standing of a voluntary association, acting on behalf neighbouring land owners, to enforce compliance with a zoning scheme.

[155] 1996 (4) SA 744 (CC).

[156] 1996 (4) SA 744 (CC) para 72.

[157] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51. The court further explained that it was safe to say that the ownership of land and corporeal movables constitutes 'lie[s] at the heart of our constitutional concept of property'.

[158] Van der Walt AJ *Constitutional property law* 3 ed (2011) 114.

the *First Certification* case,[159] Van der Walt argues that the fact that a specific object or right was not specifically mentioned in the property clause does not necessarily mean that the object or right does not constitute property worthy of constitutional protection.[160] He argues, in light of the general formulation of the property clause and the lack of specific references to a category of property, that one can assume that any form of property interest that is not expressly excluded or by necessary implication included will amount to constitutional property.[161] There is therefore a strong argument to be made that the rights of neighbouring land owners to enforce compliance with legislation, as recognised in decisions such as *Walele*, amount to property for purposes of section 25(1).

In conclusion, *Ex Parte Optimal Property Solutions CC*[162] confirmed that the limited real rights *sui generis* created by conditions of title and registered restrictive covenants amount to constitutional property for purposes of section 25. Case law has also indicated that neighbouring land owners have standing to ensure that other land owners in their area adhere to statutory limitations that protect these rights when developing their property. There is a strong argument to be made that these rights will also amount to constitutional property.

5 2 3 2 Unconstitutional deprivation of neighbouring land owners' property rights

The previous section showed that the limited real rights *sui generis,* created by conditions of title or registered restrictive covenants, amount to constitutional

[159] One of the objections to the property clause raised in the *First Certification* decision was that it did not specifically protect intellectual property rights or mineral rights. This objection was rejected by the court. See in this regard, *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) paras 74-75. Van der Walt AJ *Constitutional property law* 3 ed (2011) 124 explains that the court's finding in this regard was correct because it is unusual to list all the kinds of property that would fall under the broad term 'constitutional property'.

[160] Van der Walt AJ *Constitutional property law* 3 ed (2011) 125.

[161] Van der Walt AJ *Constitutional property law* 3 ed (2011) 124-125.

[162] 2003 (2) SA 136 (C) para 19.

property.[163] It was also argued that legislation such as the Building Standards Act, vests neighbouring land owners with the right to insist that local authorities enforce compliance with legislation. Neighbouring land owners are deprived of their limited real rights *sui generis* in circumstances where a building is constructed in breach of conditions of title or restrictive covenants. Similarly, neighbouring land owners are deprived of their constitutional property rights in instances where persons erect illegal buildings in their area. These deprivations are caused by administrative action when building plans are *approved* in conflict with restrictive covenants, conditions of title and legislation or when local authorities *fail* to demolish illegal buildings.

A land owner will, for example, build in breach of conditions of title or restrictive covenants in two instances. The first instance is where he builds in accordance with building plans that were approved even though they conflict with conditions of title or restrictive covenants or legislative prescriptions. In this instance, the deprivation of neighbouring land owners' property rights is caused by administrative action, namely the local authority's decision to *approve* building plans in conflict with these conditions. Alternatively, a land owner may build in breach of conditions of title or restrictive covenants or legislation when he proceeds with illegal building operations, *without or in contravention of* local authority approval. The deprivation of neighbouring land owners' property rights in this situation is caused by the *failure* of the local authority to demolish the illegal structure.[164] Similarly, neighbouring land owners are deprived of their constitutional property rights when the local authority *approves* plans that conflict with the zoning scheme, or when the building plans are set aside on review and the local authority *fails* to demolish the subsequently illegal building. The discussion below draws a distinction between deprivations that are caused by the *approval* of building plans and deprivations caused by the *failure* of the local authority to demolish an illegal building. Each section determines whether the respective deprivations are unconstitutional

[163] *Ex Parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) para 19.

[164] Section 1(i)(b) of the Promotion of Administrative Justice Act 3 of 2000 defines administrative action as 'any decision taken, or any failure to take a decision, by a natural or a juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect....'.

because they are unlawful, substantively arbitrary or procedurally unfair. A specific deprivation can be unconstitutional on more than one ground and the purpose of this section is to delineate the remedies that are available to those neighbouring land owners who intend to assert their rights in court.

In each case, it is necessary to first establish whether the law of general application, in this case the Building Standards Act, authorises a particular administrative action. If it is found that the local authority had acted within its authority in terms of the Building Standards Act, one can proceed to determine whether this deprivation is substantively arbitrary because there is insufficient reason for the interference with property rights. Finally one can determine whether the deprivation is procedurally unfair.[165]

Section 7 of the Building Standards Act prohibits the approval of plans unless the local authority is satisfied that it complies with the requirements of the Act itself or with that of any other law, including servitudes, restrictive covenants or conditions of title.[166] This essentially means that the local authority is not authorised to approve building plans that permit the construction of a building in conflict with, for example, limited real rights or statutory provisions. The local authority's decision to approve a building of this kind is therefore unlawful and, as a result, unconstitutional because the deprivation was not authorised by law of general application. Accordingly, it is unnecessary for neighbouring land owners to show that this deprivation is substantively arbitrary on the basis of section 25 or procedurally unfair, as proscribed by section 33 of the Constitution.

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[165] The issue of unlawfulness was discussed in section 5 1 3 above. Refer to Van der Walt AJ *Constitutional property law* 3 ed (2011) 235-237 for a detailed explanation of how the unlawfulness of, for example, administrative action will prevent litigants from directly relying on section 25 or section 33 of the Constitution to assert their rights. More specifically, refer to Van der Walt's discussion of *Growthpoint Properties Ltd v SA Commercial Catering and Allied Workers Union and others* [2010] ZAKZDHC 38 (3 September 2010), where he argues that the unlawfulness of the picket action in this case meant that it was unnecessary for the court to base its judgment on section 25 of the Constitution.

[166] Section 7(1)(a) read with section 7(1)(b) of the National Building Regulations and Building Standards Act 103 of 1977 prescribes that the local authority cannot approve building plans unless it is satisfied 'that the application in question complies with the requirements of this Act and other applicable law'.

Due to the operation of the subsidiarity principle neighbouring land owners will, in any event, be unable to directly assert their rights on the basis of either section 25 or section 33 of the Constitution. They would rather have to assert their rights on the basis of the Building Standards Act itself or, otherwise, on the basis of PAJA. Firstly, neighbouring land owners should invoke internal remedies provided for in the authorising legislation.[167] Section 9(1)(c) of the Building Standards Act states that any person who 'disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law' may launch an appeal to the review board.[168] It seems as if this section enables neighbouring land owners to appeal against the local authority's decision to approve the building plans. Alternatively, neighbouring land owners can approach the court to have the building plans set aside on review. In *Walele v City of Cape Town* (*Walele*),[169] the Constitutional Court explained that section 7 of the Building Standards Act 'creates an adequate self-contained protection which safeguards the rights of owners of neighbouring properties'.[170] Section 7(1)(b) precludes the approval of building plans if all legal requirements[171] had not been complied with, or if one of the disqualifying factors will be triggered.[172] If building plans are approved despite the existence of a disqualifying factor as set out in section 7(1)(b) of the Building Standards Act, the approval process 'becomes invalid and can be set

[167] Section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 provides that a court shall only review an administrative action if the litigants has first exhausted internal remedies provided for in the authorising legislation. This is an extension of the subsidiarity principle. PAJA was enacted to give effect to the right to just administrative action enshrined in section 33 of the Constitution. Likewise, when legislation authorises administrative action, it is likely that it will also contain provisions to ensure that such action complies with PAJA. A litigant must first invoke these internal remedies before launching an application for review in terms of section 6 of PAJA.

[168] Section 9(1)(c) of Act 103 of 1977.

[169] 2008 (11) BCLR 1067 (CC).

[170] 2008 (11) BCLR 1067 (CC) para 56.

[171] Legal requirements refer to those set in section 7(1)(a) read with section 7(1)(b)(i) of the National Building Regulations and Building Standards Act 103 of 1977.

[172] The disqualifying factors are listed in section 7(1)(b)(ii) of the National Building Regulations and Building Standards Act 103 of 1977.

aside on that ground'.[173] One can infer from *Walele* that neighbouring land owners will not necessarily have to launch review proceedings in terms of PAJA, since the building plans can be set aside on the basis of section 7(1)(b) of the Building Standards Act.[174] Litigants will, however, also be able to have the building plans set aside on review in terms of section 6 of PAJA. Possible grounds for review can include the fact that the decision to approve the plans 'contravenes the law or is not authorised by the empowering provision'[175] or that it is otherwise unconstitutional and unlawful[176] as well as the fact that a mandatory condition prescribed by the empowering provision was not complied with.[177]

To summarise: the local authority is not authorised to approve building plans that are, for example, incompatible with conditions of title. Such a decision causes an unlawful and unconstitutional deprivation of affected owners' property interests. Aggrieved land owners can launch an appeal to a review board, as provided for in section 9(1)(c) of the Building Standards Act. Alternatively, land owners can approach a court to have the plans set aside on review, either on the basis of section 7(1)(b) of the Building Standards Act or on the basis of section 6 of PAJA.

Neighbouring land owners are also deprived of their constitutional property interests in circumstances where the local authority fails to demolish an illegal building. Section 4 of the Building Standards Act prohibits any person from building unless he is in possession of validly approved building plans. This provision should be read with section 21, which states that a magistrate will have the jurisdiction, on application of any local authority, to order the demolition of a building if he is satisfied that the structure is 'contrary to or does not comply with the provisions of this Act or any approval or

[173] 2008 (11) BCLR 1067 (CC) para 56.

[174] Hoexter C *Administrative law in South Africa* (2007) 114-116 explains that PAJA is the 'primary or default pathway' for the judicial review of administrative actions. Litigants can also apply to have an administrative action set aside on review in terms of enabling legislation which specifically provides for review proceedings.

[175] Section 6(2)(f)(i) of the Promotion of Administrative Justice Act 3 of 2000.

[176] Section 6(2)(i) of the Promotion of Administrative Justice Act 3 of 2000.

[177] Section 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000.

authorization granted thereunder'.[178] Section 21 creates the impression that the local authority has the discretion to approach the court for a demolition order. The question is whether the local authority's failure to act would result in a substantively arbitrary deprivation of property.

There is no definite indication of when such a deprivation will be substantively arbitrary for purposes of section 25(1) of the Constitution. Explained differently, there is no *per se* rule as to when the law of general application will provide 'sufficient reason' for the deprivation.[179]

Each dispute will have to be analysed with reference to its case-specific circumstances. The factors that influenced the court in *Camps Bay Ratepayers and Resident's Association v Harrison*[180] will certainly be relevant when the courts determine whether the local authority's failure to act caused a substantively arbitrary deprivation of property. These factors were the seriousness of the respondent's infraction of the zoning scheme; whether her infraction interfered with her neighbours' rights or impacted on the character of the area; and whether her partially illegal building was detrimental to the environment or posed a health and safety threat to the public. A further factor was the delay of the appellants and the local authority to have her building plans set aside and the intent with which the illegal building was constructed. Collectively, these considerations indicated that the neighbouring land owners in *Camps Bay* had not been arbitrarily deprived of their constitutional property rights by the decision not to demolish. The complete or partial demolition of the respondent's building would have amounted to a substantively arbitrary deprivation of her legal property rights, given the weighing up of all the circumstances and considerations.

On the basis of the *Camps Bay* factors one can conclude that failure of the local authority to demolish the structures in *City of Tshwane v Ghani*[181] would most likely

[178] Section 21 of the National Building Standards and Building Regulations Act 103 of 1977.

[179] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[180] [2010] ZASCA 3 (17 February 2010).

[181] 2009 (5) SA 563 (T).

have amounted to a substantively arbitrary deprivation of neighbouring land owners' constitutional property rights. Moreover, the local authority's failure to act in both *City of Tshwane v Ghani* and *Barnett and others v Minister of Land Affairs and others*[182] would have resulted in a substantively arbitrary deprivation of the property rights of the owners of the plots on which the illegal buildings were built. Explained differently, there would have been – in the words of *FNB* – insufficient reason to allow the illegal buildings to stand. In particular, these deprivations would have been substantively arbitrary because the structures were built in blatant disregard of the law and the rights of others. There was no specific explanation for why the buildings in these instances should not have been demolished, particularly since demolition did not affect any legitimate property rights of the illegal builders at all. In fact, demolition of the structures was the most effective way in which the court could protect the rights of the owners of the plots, neighbouring land owners and the public interest in the conservation of the environment and healthy and safe urban areas.

Likewise, there would have to be compelling reasons to preclude a finding of substantive arbitrariness in circumstances where the local authority fails to demolish an illegal building that conflicts with conditions of title or restrictive covenants that benefit other land owners. The reason for this is that the illegal building directly infringes on the limited real rights of other land owners. By contrast, a court would be more reluctant to find that neighbouring land owners have been arbitrarily deprived of property when a neighbour's building plans are set aside on review but the consequently illegal building is not demolished. When building plans are set aside on review, a local authority will typically first determine whether the illegal structure can be altered (which includes partial demolition) so that it meets statutory requirements. If an illegal structure is brought in line with the Act, it will no longer interfere with the rights of neighbouring land owners; pose a threat to the health and safety of the public; or negatively impact on the character of the area. In these circumstances, neighbouring land owners will not be arbitrarily deprived of their property rights if the building is not demolished. Conversely, failure of the local authority to demolish an illegal building that cannot be remedied will

[182] 2007 (6) SA 313 (SCA).

probably amount to a substantively arbitrary deprivation of neighbouring land owners' property rights. It is clear from these examples that there is no general rule as to when the failure of the local authority to demolish an illegal building will amount to a substantively arbitrary deprivation of neighbours' constitutional property rights. As stated above, a range of factors will play a role in the outcome of the substantive arbitrariness test in every case.

Instead of relying on section 25(1), neighbouring land owners can assert their rights on the basis of just administrative action as embodied in section 33 of the Constitution. The subsidiarity principle requires of litigants to rely on the remedies provided for in legislation enacted to give effect to the rights embodied in the Bill of Rights. PAJA gives effect to the constitutional right to administrative action that is lawful, reasonable and procedurally fair. It provides a range of grounds on which neighbouring land owners can have the administrative action – the local authority's failure to demolish the illegal building – set aside on review.[183] For example, neighbouring land owners can argue that the local authority's decision was procedurally unfair,[184] arbitrary or capricious,[185] or that it was taken in bad faith.[186] Crucially, section 7(2)(a) of PAJA provides that a court or a tribunal will not hear an application for review unless the litigant has first exhausted internal remedies provided for in the authorising legislation. As explained above, section 9(1)(c) of the Building Standards Act provides the right to launch an appeal to a review board. Finally, neighbouring land owners can also launch review proceedings on the basis of section 7(1)(b) of the Building Standards Act. It might be preferable for land owners to rely on section 7(1)(b) to have the local authority's decision set aside if a building was, for instance, deliberately constructed without building plans, as required by section 4, or in conflict with conditions of title as

[183] Section 1(i)(b) of the Promotion of Administrative Justice Act 3 of 2000 provides that the definition of administrative action includes any decision taken or any failure to take a decision by 'a natural or juristic person, other than an organ of state, when exercising an public power or performing a public function in terms of an empowering provision'.

[184] Section 6(2)(c) of the Promotion of Administrative Justice Act 3 of 2000.

[185] Section 6(2)(e)(vi) of the Promotion of Administrative Justice Act 3 of 2000.

[186] Section 6(2)(e)(v) of the Promotion of Administrative Justice Act 3 of 2000.

proscribed by section 7(1)(a) of the Building Standards Act. However, in the instance where building plans are set aside on review, it could be more advantageous for neighbouring land owners to launch review proceedings on the basis of PAJA. The reason for this is that PAJA provides a wider range of grounds on which the local authority's decision can be impugned. Nevertheless, the cause of action should be tailored according to the unique circumstances of each case.

In conclusion, neighbouring land owners are deprived of their constitutional property rights in circumstances where the local authority fails to demolish an illegal building. From the wording of section 21 of the Building Standards Act, one can assume that the local authority has the discretion to apply to the court for a demolition order. This means that the local authority is authorised to exercise its discretion in favour of not demolishing certain illegal buildings. This administrative action can cause an unconstitutional deprivation of neighbouring land owner's property rights. More specifically, depending on the case-specific factors, the deprivation can be substantively arbitrary as proscribed by section 25 of the Constitution when there is insufficient reason for such a decision. For instance, in *Camps Bay* there was sufficient reason to justify a decision to not order the demolition of the illegal building or building works, given the fact that demolition would have had excessively negative consequences for the land owner; the fact that the illegal parts of the building was so minor that it had gone unnoticed for three years and that it had little or no impact on the rights of neighbouring land owners; on the character of the area and on the health and safety interests of the public. Importantly, there would have to be more compelling reasons to justify the local authority's decision to allow an illegal building to stand if it conflicts with, for example, restrictive covenants or conditions of title.

5 3 Limitations on the land owner's right to demolish historic buildings

5 3 1 Introduction

Chapter 4 described the limitations imposed by heritage preservation laws on a land owner's right to demolish existing buildings on his land. More specifically, chapter 4 distinguished between buildings that are either formally or generally protected under the

National Heritage Resources Act 25 of 1999 (the Heritage Resources Act). This chapter further explained that a land owner may not demolish, alter or damage a building once it is placed under the formal protection of the Heritage Resources Act. Furthermore, the land owner has an implied statutory obligation to maintain the listed building, at his own expense, so as to avoid a compulsory restoration order.[187]

Section 34(1) of the National Heritage Resources Act 25 of 1999 (the Heritage Resources Act), a general protection measure, places significant limitations on the exercise of ownership entitlements since it regulates the owner's right to demolish a building even though it is not a formally protected by the Act. More specifically, the section proscribes the demolition of buildings that are older than 60 years without a permit issued by the heritage authority.[188] The focus of this discussion falls on the limitations imposed on the land owners exercise of his demolition rights by section 34(1) the Heritage Resources Act because this provision provides a more compelling example of the nature and extent of the interferences with property rights brought about by heritage preservation laws. However, the arguments formulated below are also relevant in the instance of listed (formally protected) buildings.

Case law indicates that the South African courts have accepted heritage preservation as a legitimate exercise of the state's police power. In *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another*,[189] the court held that ownership is 'no longer' an absolute right and that ownership entitlements 'can only be exercised in accordance with the social function of the law and the interests of the community'.[190] The court also explained that the Heritage Resources Act contributes to

[187] See the discussion of the formal protection measures of the National Heritage Resources Act 25 of 1999 in chapter 4, section 4 2.

[188] Section 34(1) of the Heritage Resources Act 25 of 1999. Section 34(2) provides that a heritage resource authority should, within three months of refusing the demolition permit, consider protecting the building under one of the formal protections of the Act. See the discussion of section 34 of the Heritage Resources Act 25 of 1999 in chapter 4, section 4 3.

[189] 2007 (4) SA 26 (C).

[190] 2007 (4) SA 26 (C) 37.

the framework within which 'the right of ownership in South Africa now functions'.[191] Case law further shows that the courts tend to interpret the provisions of the Heritage Resources Act in a manner that bestows wider, rather than narrower powers on the heritage authorities to achieve the goals set out in the Act.[192] Chapter 4 concluded that it would be the exception, rather than the rule, for a property owner to obtain a demolition permit if there is the possibility that the building is historically or culturally valuable. The public interest in preserving valuable buildings will more often than not outweigh the owner's right to demolish the building. Nevertheless, it is likely that there will be circumstances where the preservation of an historic building will impose a disproportionate burden on the owner. To date there has not been a South African case where a property owner has challenged the effect of section 34 on constitutional grounds. As a result, it is still unclear when it would be unconstitutional to deny an owner the right to demolish a building that is protected by the heritage preservation laws. This issue has been addressed by both the German Federal Constitutional Court and the United States Supreme Court.[193] The remainder of chapter 4 described the circumstances under which these courts would conclude that heritage preservation laws impose disproportionate burden on land owners.

The section below considers the constitutional issues that arise in relation to the enforcement of section 34 of the Heritage Resources Act. Specifically, the section argues that an owner is deprived of property when he unsuccessfully applies for a demolition permit as required by the Heritage Resources Act. This deprivation is caused by administrative action, namely the heritage authority's decision to deny the application for the demolition permit. It is argued below that the deprivation is authorised by law of general application, namely section 34(1) of the Heritage Resources Act and that it is

[191] 2007 (4) SA 26 (C) 37.

[192] In *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) 37 and *Provincial Heritage Resources Authority, Eastern Cape v Gordon* 2005 (2) SA 283 (E). See the discussion of these cases in chapter 4, section *4 3 3 1* and *4 3 3 2*.

[193] Refer to chapter 4, section 4 4 for a discussion of the constitutionality of heritage preservation statutes in US law and to section 4 5 for a discussion of the constitutionality of heritage preservation laws within the German context.

therefore lawful. However, this deprivation has the potential to be substantively arbitrary, depending on the unique circumstances of the case. There may also be instances where the deprivation will fall foul of the administrative justice provisions in the Heritage Resources Act or in PAJA. Land owners may in these instances impugn the decision to deny a demolition permit on, for example, procedural fairness grounds. The section below elaborates on these issues.

5 3 2 Unconstitutional deprivation of property

As explained above, a land owner is in principle deprived of his property rights when he unsuccessfully applies for a demolition permit as required by a heritage preservation law. This deprivation is caused by administrative action, namely the exercise of the heritage authority's discretion to deny the demolition permit. The deprivation will be invalid and unconstitutional if the law of general application does not authorise that specific interference with property rights. In the South African context, the deprivation is authorised by the Heritage Resources Act which enables the heritage authority to deny demolition permit for a protected building.[194] Section 34(1) of the Heritage Resources Act goes a step further since it authorises the heritage authority to deny a demolition permit for a building that is older than 60 years even though it is not formally protected under the Act. This provision therefore meets the law of general application and authorisation requirements and it cannot be said that the deprivation is unlawful and, as a result, unconstitutional. Accordingly, one can proceed to determine whether the deprivation is in conflict with section 25(1) because it is substantively arbitrary.

FNB[195] has confirmed that a deprivation is substantively arbitrary if the 'law of general application' – in this case the Heritage Resources Act – does not provide 'sufficient reason for the particular deprivation in question'.[196] As explained above, case law has not yet indicated when there will be sufficient reason to justify the limitations

[194] See for instance section 27(18) of the National Heritage Resources Act 25 of 1999.

[195] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[196] 2002 (4) SA 768 (CC) para 100.

imposed on ownership for purposes of historic preservation. However, the general principles regarding arbitrary deprivation that were set out in *FNB*[197] apply to historic preservation as well and it is possible to deduce guidelines for their application to historic preservation cases.

Importantly, historic preservation is a legitimate exercise of the state's police power. This implies that the state has the power to limit ownership entitlements to preserve significant buildings in the public interest. Moreover, ownership has never been an absolute right[198] and it has to yield to the prevailing needs of society such as historic preservation.[199] Viewed from this perspective it is clear that the ownership of historic structures is accompanied by certain obligations, such as the duty to preserve aspects of such buildings that are valued by his community or the broader public.[200] These obligations will not necessarily amount to a substantively arbitrary deprivation of property.

One can for instance deduce that a limitation on the owner's right to paint his historic building a certain colour will generally not amount to a disproportionate interference with property rights. In this example there is a strong relationship between the deprivation (a limitation on the owner's right to paint his building) and the purpose of

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[197] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[198] In his seminal article Visser DP 'The absoluteness of ownership: the South African common law in perspective' 1985 *Acta Juridica* 39-52 explains how the notion of 'absoluteness' was incorrectly incorporated into South African law. See to the same effect, Milton JRL 'Planning and property' 1985 *Acta Juridica* 267-288 at 275 and Van der Walt AJ 'The South African law of ownership: a historical and philosophical perspective' (1992) 25 *De Jure* 446-457. The concept of 'absoluteness' is discussed in greater detail in chapter 6, section 6 3 1.

[199] Milton JRL 'Planning and property' 1985 *Acta Juridica* 267-288 at 273-277 explains that ownership has always been regulated in the public interest. The earliest example of such a regulation is the common law rules pertaining to nuisance law. Industrialisation brought with it a new set of regulations designed to limit ownership for the welfare of the general public. See the discussion in chapter 6, section 6 3 1.

[200] Van der Walt AJ 'The effect of environmental conservation measures on the concept of landownership' (1987) 104 *SALJ* 469-479 at 478-479 suggests that the law should create a new system of rights to use land and it should move away from the emphasis placed on the ownership of land. See the discussion in chapter 6, section 6 2.

the deprivation, namely the preservation of unique features of an historic building. The purpose of the deprivation can only be achieved by restricting the specific land owner's rights – there is therefore a direct link between the preservation of the characteristics of the building and the affected land owner. Moreover, a limitation on the owner's right to paint his building a certain colour does not constitute a drastic interference with ownership entitlements. Accordingly, one can argue that there is a proportional relationship between the preservation of certain external features of the building and the interference with property rights. Arguably, there will be sufficient reason to justify such an inroad into ownership entitlements.

Likewise, prohibiting the demolition of the facade or the outer shell of an historic building will not automatically result in an arbitrary deprivation of property. In this example there will arguably be a direct relationship between the deprivation and the purpose of the deprivation, namely preservation of the external features of an historic building. Other factors that will weigh against a finding of substantive arbitrariness is that, although this is a rather significant interference with ownership entitlements, the owner will still be able to use his property to some extent. Moreover, the purpose of the deprivation can only really be achieved by placing this restriction on the particular owner. There is also a strong relationship between the purpose of the deprivation (preservation of external historic features of a building), the extent of the interference with ownership entitlements and the nature of the property (a historic building). Collectively these considerations indicate that there is a proportional relationship between the means (limitation on the owner's right to demolish or alter the outer shell or facade) and end (preservation of cultural and historic treasures). One can conclude that generally there will be sufficient reason to justify such an interference with ownership entitlements.

However, there are instances where the limitation on ownership entitlements for the sake of historic preservation might be disproportionate to the purpose of the Heritage Resources Act, namely the preservation of historic buildings in the public interest. Such a circumstance would arise where the goals of the Heritage Resources Act can only be achieved if the owner's rights in relation to his building are limited to such an extent that he no longer derives any benefits from ownership or use of his

property. What is more, the goals of the Heritage Resources Act can only be attained if, in addition to eroding ownership entitlements, it imposes a positive obligation on the owner to maintain the historic property at his own expense. This is more or less the position that the land owner in the German *Rheinland-Pfälzisches Denkmalschutz-und-Pflegegesetz* case[201] found herself in.[202] This German case has been discussed in greater detail in chapter 4.[203] For purposes of this discussion, it suffices to say that the owner had unsuccessfully applied for a demolition permit for a decaying Villa, which had stood vacant for eighteen years and was no longer suitable to be used for residential purposes. The land owner struggled for years to find an alternative use for the building, including tenancy and offering the free use of the structure to a museum, subject to the condition that it bears the cost of maintaining the property. None of her attempts to find a use of the building was successful. She further explained that the cost of restoring and maintaining the building would have been prohibitively expensive. The preservation of the building resulted in the owner being deprived of all economic use of the building.[204]

In particular, the Heritage Resources Act can create a similar situation if the heritage authority refuses to grant a demolition permit for a decaying historic building which the owner cannot use for any economically viable purpose because the cost of restoration and subsequent maintenance is too expensive. This in turn would make it increasingly difficult for the owner to sell or to lease the property. In such an instance the owner would arguably bear a disproportionate burden on behalf of the public as a whole. The *FNB* substantive arbitrariness test shows that under these circumstances the Heritage Resources Act authorises an unconstitutional interference with property rights.

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[201] *BVerfGE* 100, 226 [1999].

[202] Refer to Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 119-121 for a discussion of the case. See further Du Plessis E 'To what extent may the state regulate private property for environmental purposes? A comparative study' 2011 *TSAR* 512-526 at 523.

[203] Refer to chapter 4 section 4 5 2 for a discussion of this case.

[204] *BVerfGE* 100, 226 [1999] paras 43-46 and 91-93. See the discussion of this case in chapter 4, section 4 5.

FNB states that a deprivation will be arbitrary if the law of general application does not provide sufficient reason for the deprivation or is procedurally unfair. Sufficient reason has to be established by an analysis of the complexity of relationships involved in a section 25(1) dispute.[205] The deprivation (the means) in question comprises of two elements, namely limiting the owner's rights to demolish the building, which will have a series of knock-on effects, and imposing a positive obligation to maintain the property. The purpose of the deprivation is the preservation of historic buildings in the public interest. There is a direct relationship between (in the words of *FNB*) 'the means employed', namely the deprivation and 'the ends sought to be achieved', that is, the purpose of the deprivation. [206] However, the effect of the deprivation is that the owner is denied the right to demolish a decaying structure because it has historic or cultural value, even though he has no reasonable use for the building. The state of the structure and the fact that he is unable to obtain a demolition order will dissuade potential buyers from purchasing the land for development purposes. Likewise, the building cannot be leased without restoring it to a habitable condition at exorbitant expense. Furthermore, the continued maintenance of the restored structure will place an additional financial burden on the owner. Once the building is placed under formal protection of the Heritage Resources Act, the owner can be compelled to restore and to maintain the structure at his own expense to avoid a section 45 compulsory restoration order.[207] In effect, this preservation measure could in certain circumstances not only deprive the owner of all economic use of the property, which includes the possibility of developing, selling or leasing the land, but might also compel him to maintain the structure at great expense. Consequently, the owner is singled out to bear the burden of preserving a historically valuable building in the public interest, without deriving any use or benefit from it. The degree of the interference with property rights cannot be offset by the

[205] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[206] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100

[207] Section 45(1)(a) of Act 25 of 1999. See in this regard the explanation in chapter 4, section *4 3 3 2,* footnote 104.

purpose of the deprivation, namely historic preservation to the benefit of the public as a whole.

Although this deprivation is imposed for an otherwise legitimate purpose, it is especially invasive because it has the potential to not only affect the owner's rights in relation to the historic building. Both *Qualidental*[208] decisions confirmed that, in addition to prohibiting the demolition of a historic structure, the heritage authority has the power to impose conditions that impact on the use of the property on which the building is situated to further heritage preservation goals. These conditions can regulate the extent and nature of future developments of the land and it can include a positive obligation to maintain other historically relevant aspects of the property, such as the garden. Collectively, these statutory interferences will have far-reaching consequences for the owner. In fact, one can argue that because of the limitations imposed for heritage preservation purposes, the concept of ownership is so watered down that it has become meaningless.

FNB requires more compelling reasons for the deprivation if it relates to the ownership of land than in the instance where the affected property right is something different, such as a car; and also if it affects all the incidents of ownership rather than just some.[209] Clearly, this deprivation embraces most of the incidents of the ownership of land. The owner may in effect be deprived of all economic use of the building because he is unable to obtain a demolition order. Even if the building could be restored, the cost of maintaining the property according to the desired standards might place an immense financial burden on the owner. The result could therefore, in extreme cases, be that the owner is burdened with the cost of maintaining the property to very high standards, while not being able to use it, exploit it economically or sell it.

It is doubtful whether the purpose of the Heritage Resources Act will justify such a drastic interference with the ownership of land. An owner cannot be expected to bear

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[208] *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) and *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2008 (3) SA 160 (SCA).

[209] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

the full financial responsibility of preserving an historic building in the public interest when he derives absolutely no benefit from the ownership of such a structure. Viewed from this perspective, it becomes evident that, at least in extreme cases, there might be a disproportionate relationship between the extent of the deprivation and the purpose of the interference with property rights. The Heritage Resources Act fulfils an important function in the South African society in that it enables heritage authorities – with expertise in their respective fields – to identify and preserve cultural treasures for future generations. Arguably, the Heritage Resources Act can impose significant limitations on ownership to achieve this purpose, limitations which will not necessarily amount to unconstitutional interferences with property rights. Nevertheless, the Heritage Resources Act cannot authorise a heritage authority to deny a demolition permit if it will put an individual owner (or group of owners) in the position where he (or they) must maintain a building – which cannot be put to any economically viable use – at exorbitant expense. One can conclude that the stated purpose of the Heritage Resources Act, namely historic preservation, will not constitute 'sufficient reason' to justify the situation where ownership is rendered nugatory. Accordingly, the Heritage Resources Act has the potential to authorise the imposition of a disproportionate burden on the owner. Explained differently, the Heritage Resources Act can potentially authorise a substantively arbitrary deprivation of property, in conflict with section 25(1).

The implication is that, under the correct circumstances, the Heritage Resources Act can be declared invalid and unconstitutional on the basis of section 25(1). This is regrettable because the Heritage Resources Act was specifically enacted to accommodate the public interest in historic preservation. Foreign jurisdictions have found ways to prevent legislation that fulfils an otherwise important function from being declared unconstitutional because it imposes disproportionate burdens on the owners.

The US courts have long recognised that they can order the payment of compensation in instances where a regulatory measure imposes an excessive burden on an individual or group of property owners in the public interest.[210] Explained differently, the court can order the payment of compensation where a regulatory

[210] Van der Walt AJ *Constitutional property law* 3 ed (2011) 356.

measure has the effect of an expropriation. In US law this phenomenon is referred to as a regulatory taking or the constructive expropriation of property.[211] The doctrine of constructive expropriation enables a court to either order the payment of compensation or to declare the law invalid in the instance where a regulatory measure goes too far in its interference with property rights.[212] For example, a court can order the payment of compensation to a land owner where the Heritage Resources Act deprives him of all economic use of his property. In so doing, a court can prevent a finding that the Heritage Resources Act is unconstitutional insofar as it authorises excessive inroads in property rights. However, Van der Walt argues that it is undesirable to incorporate the doctrine of expropriation into South African law. The reason for this is that expropriation can only occur if it is authorised by legislation and 'implemented by an administrative decision to expropriate'.[213] Moreover, courts should not have the power to transform a regulatory action into expropriation simply because the deprivation disproportionately burdens an individual or a group of property owners.[214]

The *FNB* decision has, in any event, probably precluded the possibility of adopting the doctrine of constructive expropriation in South African law.[215] The reason for this is that typically, constructive expropriation is classified as a grey area between deprivation and expropriation. It is not a pure deprivation because it does not affect all property owners in more or less the same way. It is not a pure expropriation either, because the state does not actually acquire or physically destroy the property and, further, because the expropriation is not expressly authorised in legislation. The Constitutional Court in *FNB* classified all state interferences as deprivations. By implication, all state interferences will first have to meet the two requirements set out in section 25(1), before a court can proceed to determine whether an expropriation has taken place. It seems

[211] Refer to Van der Walt AJ *Constitutional property law* 3 ed (2011) 347-394 for a comprehensive discussion of the doctrine of constructive expropriation.

[212] Refer to Van der Walt AJ *Constitutional property law* 3 ed (2011) 355-359 for an explanation of how the doctrine of constructive expropriation operates in the US context.

[213] Van der Walt AJ *Constitutional property law* 3 ed (2011) 288.

[214] Van der Walt AJ *Constitutional property law* 3 ed (2011) 288.

[215] Refer to Van der Walt AJ *Constitutional property law* 3 ed (2011) 376-384 for a general discussion on the possibility of incorporating the doctrine of constructive expropriation into South African law.

unlikely, if not impossible, that a statutory regulation will pass the *FNB* non-arbitrariness test if it goes too far in its interference with ownership entitlements.[216] The court will consequently not be able to proceed beyond the question of whether the Heritage Resources Act imposes an arbitrary deprivation of property.[217] In essence, the court will not reach the stage where it can order the payment of compensation because a regulatory measure has the effect of expropriation. If the *FNB* methodology[218] is followed, the regulatory measure will simply be declared invalid and unconstitutional.[219]

German law has adopted equalisation measures (*Ausgleich*) to prevent otherwise legitimate laws from imposing disproportionate, and therefore invalid, burdens on land owners.[220] These measures[221] are incorporated in the authorising legislation and they are specifically designed to mitigate excessive loss or damage caused by lawful state action.[222] Stated differently, the payment of an equalisation sum or other compensatory measure will soften the overly harmful effects brought about by the statutory regulation

[216] Van der Walt AJ *Constitutional property law* 3 ed (2011) 384. See to the same effect Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 41-42.

[217] This is the 'telescoping effect' of the non- arbitrariness requirement of section 25(1) that has been identified by Roux. See in this regard Roux T 'Property' in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* Volume 3 2 ed (2003 original service: Dec 2003) chapter 46 at 2-5 and18-19. Refer to section 5 1 2 footnote 23 for an explanation of Roux's theory.

[218] Refer to section 5 1 2 for an explanation of the *FNB* methodology.

[219] Furthermore, Roux argues that if the *FNB* methodology is followed a court will not proceed to the question of whether the regulatory limitation is reasonable and justifiable in light of section 36(1) of the Constitution. A deprivation, which falls foul of section 25 (1) will arguably also not meet the requirements of section 36(1). See in this regard argument in section 5 1 2 footnote 22 above.

[220] Refer to Van der Walt AJ *Constitutional property law* 3 ed (2011) 367; Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 236-239 and Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 42-47 for a detailed explanation of the German equalisation measures.

[221] Van der Walt AJ *Constitutional property law* 3 ed (2011) 367. See the discussion in chapter 4, section *4 5 2 2*.

[222] Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 47.

of property in the public interest.[223] Without such a measure the authorising law will be declared invalid insofar as it authorises an unconstitutional interference with property rights.[224] This was the conclusion reached by the German Federal Constitutional Court in the *Rheinland-Pfälzisches Denkmalschutz-und-Pflegegesetz* case.[225] More specifically, the court decided that relevant historic preservation law was unconstitutional because it did not avoid the imposition of disproportionate burdens on land owners.[226] The law might have been saved from such a finding had the legislature incorporated an equalisation measure designed to cater for the circumstance where the Act singled out the owner to bear an excessive burden in the public interest.[227] A general compensation provision could not qualify as an equalisation measure and it could not take the place of a demolition order. The court concluded that the legislator should provide for the granting of a demolition order where the operation of the heritage preservation law leads to extreme hardship, and where an equalisation measure was not specifically designed to avoid disproportionate consequences.

Equalisation-style measures are not uncommon in South Africa. Van der Walt explains that the equalisation measures are similar to the constitutional damages granted by the Supreme Court of Appeal in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*[228] (*Modderklip*). Like its German counterpart, the constitutional damages in *Modderklip* were designed to compensate the owner for excessive losses caused by otherwise

[223] Van der Walt AJ *Constitutional property law* 3 ed (2011) 367. See to the same effect, Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 118 and Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 42. See further the discussion chapter 4, section *4 5 2 2*.

[224] Van der Walt AJ *Constitutional property law* 3 ed (2011) 367.

[225] *BVerfGE* 100, 226 [1999].

[226] *BVerfGE* 100, 226 [1999] para 93.

[227] *BVerfGE* 100, 226 [1999] para 96. See the explanation in Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 120.

[228] 2004 (6) SA 40 (SCA).

legitimate state action. The constitutional damages awarded in *Modderklip* differ from equalisation payments in the sense that the latter are awarded in terms of the specific authorising legislation.[229] There are other examples of equalisation-style measures that have been incorporated into South African legislation.[230] It is, therefore, essential to determine whether the Heritage Resources Act contains a similar measure that will alleviate the otherwise excessive interference with property rights. Equalisation measures in the context of historic preservation need not be limited to an equalisation sum (a monetary award). It can also include tax breaks or subsidies for owners who preserve historic buildings in the public interest. Equalisation can also refer to a statutory provision which authorises the owner to charge the general public entrance fees to access the historic site. Furthermore, equalisation can include allowing the owner to deviate from zoning restrictions which would normally be imposed on the use of his land. Finally, in the US context, the transferable development rights

[229] Van der Walt AJ *Constitutional property law* 3 ed (2011) 277-280 and to the same effect Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 42-47.

[230] Section 22(6) of the National Water Act 36 of 1998 is a perfect example of an equalisation measure that was incorporated into the law to mitigate the losses caused by lawful state action. This section provides that ' [a]ny person who has applied for a licence in terms of section 43 in respect of an existing lawful water use as contemplated in section 32 and whose application has been refused or who has been granted a licence for a lesser use than the existing lawful water use, resulting in severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used, may subject to subsections (7) and (8) claim compensation for any financial loss suffered in consequence'. This provision does not compensate a person for the loss of a water-use license but rather for the financial loss caused by the lawful state action. The provision makes it clear that any form of financial loss will not be compensated. Compensation will only be paid if the state action threatens the 'economic viability' of a business that has become dependent on its water-use licence. Explained differently, this provision only provides for compensation in the case of overly excessive interferences with property rights. Likewise, section 19 of the Animal Diseases Act 35 of 1984 provides for the payment of compensation to farmers who had to slaughter their cattle because they have become infected with a contagious disease. The amount paid is aimed at reducing the burden that farmers have to bear because of lawful state action. See in this regard *Minister of Agriculture and others v Bluelilliesbush Dairy Farming and another* 2008 (5) SA 522 (SCA). See in this regard Van der Walt *Constitutional property law* 3 ed (2011) 281.

relevant in *Penn Central Transportation Company v City of New York*[231] will also amount to equalisation measures.

The Heritage Resources Act incorporates two provisions that might reduce the burden imposed on land owners. In terms of section 40(1) the South African Heritage Resources Agency (SAHRA) 'may provide financial assistance in the form of a grant or a loan to an approved body or individual for any project which contributes to the purpose, and is in accordance with the principles prescribed'.[232] Section 40 also determines that the SAHRA must prescribe the procedures for applications for 'approval and granting of financial assistance and the criteria for the assessment of projects.'[233] The second provision, section 42, provides for the conclusion of heritage agreements between the owner and the heritage authorities. These agreements may provide for 'financial or other assistance from the heritage authority concerned';[234] maintenance and management of the place;[235] or the payment of any expenses incurred by the owner in connection with the maintenance of the property.[236] Whether or not these provisions will qualify as equalisation measures is open to debate. On the one hand, a South African might find that sections 40(1) and 42 provide the owner with relief in the circumstance where the Heritage Resources Act authorises excessive interferences with his property rights. In this sense both these provisions can be seen as equalisation measures. On the other hand, these provisions are very general and do not circumscribe the instances when owners would actually be entitled to some form of assistance. German law requires that equalisation measures should be created to prevent the imposition of disproportionate burdens in specific circumstances. However, a general compensation provision will not qualify as an *Ausgleich* measure[237] because, if vague and general provisions are considered

[231] 438 US 104 (1978). See the discussion of this case in chapter 4, section 4 4 3.

[232] Section 40(1) of the National Heritage Resources Act 25 of 1999.

[233] Section 40(2) of the National Heritage Resources Act 25 of 1999.

[234] Section 42(2) of the National Heritage Resources Act 25 of 1999.

[235] Section 42(9)(a) of the National Heritage Resources Act 25 of 1999.

[236] Section 42(9)(h) of the National Heritage Resources Act 25 of 1999.

[237] *BVerfGE* 100, 226 [1999] para 98.

equalisation measures another problem can arise, namely whether they cover all the losses that a land owner can suffer in extreme cases.

Finally, once a land owner has considered the issue of substantive arbitrariness he can proceed to determine whether the heritage authority's decision to deny the demolition permit was fair on administrative law grounds. However, the courts are generally unwilling to find that the heritage authority's decision to refuse a section 34(1) demolition permit is wrong.[238] This does not mean that the courts will rubberstamp unreasonable decisions made by these authorities. A court will review a heritage authority's refusal to grant a demolition permit if a litigant can show that the decision does not accord with the goals of the Act, that it is not reasonably supported by the facts of the case, or if it was not reasonable in view of the reasons given for that decision.[239] The reason for this is that the court must respect the policy decisions made by the heritage authorities that have expertise in the field of historic preservation. Nevertheless, the heritage authority's decision can be challenged on the ground that it fails to meet the standards set for just administrative action in section 33 of the Constitution as given effect to in the Heritage Resources Act[240] and the Promotion of Administrative Justice Act 3 of 2000.

The subsidiarity principle requires of an aggrieved land owner to first exhaust remedies provided by the authorising legislation before relying on a constitutional provision. Section 49 of the Heritage Resources Act enables land owners to launch an appeal to an independent tribunal against any decision taken by the heritage authorities.

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[238] *Corrans v Mec for the Department of Sport, Recreation, Arts and Culture, Eastern Cape, and others* 2009 (5) SA 512 (ECG) paras 21-22.

[239] *Corrans v Mec for the Department of Sport, Recreation, Arts and Culture, Eastern Cape, and others* 2009 (5) SA 512 (ECG) para 22 citing *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) para 48.

[240] Section 10 of Act 25 of 1999 sets out general principles of procedure that are applicable to any decision regarding the administration and management of the national estate including any decision to 'formally protect a heritage resource by notice in the Gazette or *Provincial Gazette*' or to 'issue or not to issue a permit' and any decision 'taken by any person or authority to whom an appeal is made'. The principles listed in section 10(2) include that a person who may be affected by a decision has the right to appear at a meeting and written reasons must be given for any decision upon request.

A land owner can apply for the review of the heritage authority's decision in terms of section 6 of PAJA, once he has exhausted internal remedies.[241] Possible grounds for review can include procedural fairness,[242] rationality[243] and that the decision was taken in bad faith[244] or arbitrarily or capriciously.[245] Similarly, in *Provincial Heritage Resources Authority, Eastern Cape v Gordon*,[246] the court confirmed that a property owner must submit a new application for a demolition permit, where a previous application was unsuccessful and where, after the lapse of three months, the heritage authority had not placed the building under formal protection as prescribed by section 34(2) of the Act. A land owner can challenge the heritage authority's failure to make a decision[247] on the basis of PAJA in the instance where the heritage authority continuously fails to grant a demolition permit.

In conclusion, heritage preservation is legitimate exercise of the state's police power and a range of limitations can be imposed on property rights for historic preservation purposes. Ownership is not an absolute right and it is accompanied by certain obligations, some of which are circumscribed in legislation. The ownership of a listed building is for example, accompanied by the obligation to preserve unique characteristics of that structure. Viewed from this perspective it is clear that limitations imposed on ownership for historic preservation purposes will not necessarily amount to an unconstitutional interference with property rights. Nevertheless, there may be rare instances where the limitation on the owner's right to demolish an historic structure will amount to an unconstitutional deprivation of property rights.

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[241] Section 7(2)(a) of the PAJA provides that a court or a tribunal will not review administrative action on the grounds of the PAJA unless internal remedies provided for in 'any other law have first been exhausted'. The implication is that land owners would only be able to launch review proceedings in terms of the PAJA once he has launched a section 49 appeal.

[242] Section 6(2)(c) of Act 3 of 2000.

[243] Sections 6(2)(f)(ii)(aa)-(dd) of Act 3 of 2000.

[244] Section 6(2)(e)(v) of Act 3 of 2000.

[245] Section 6(2)(e)(vi) of Act 3 of 2000.

[246] 2005 (2) SA 283 (E).

[247] Section 6(3)(a) and (b) of the Promotion of Administrative Justice Act 3 of 2000 provides that the failure of administrator to make a decision is a ground for review.

When scrutinising the constitutionality of a deprivation, one must first determine whether the specific interference with property rights is authorised by the law of general application. Authorisation was not an issue in the discussion above because the Heritage Resources Act enables the heritage authorities to deny demolition permits for listed buildings or, in the case of section 34(1), buildings that are older than 60 years. However, there may be instances where the Heritage Resources Act authorises a substantively arbitrary deprivation of property because the effect of the decision to deny the demolition permit excessively interferes with property rights, without adequate reason. This means that there may be instances where a court can find that the Heritage Resources Act is invalid insofar as it authorises the heritage authorities to impose substantively arbitrary deprivations of property on land owners. Such an outcome is undesirable because the Heritage Resources Act fulfils an important function, namely it enables the preservation of the South African heritage. German law equalisation measures may prevent an act from being declared unconstitutional insofar as it imposes disproportionate burdens on land owners. Equalisation measures, specifically incorporated into the authorising legislation, are crafted to alleviate the burdens imposed on land owners. The Heritage Resources Act includes two provisions which resemble equalisation-style measures. These provisions may, in some instances preclude a finding of substantive arbitrariness. However, there also may be instances where these provisions are inadequate insofar as they do not cater for the extent of the losses suffered by the land owner. Further research is necessary to determine the exact nature of equalisation measures in the South African context.

Instead of following the section 25(1) substantive arbitrariness route, a land owner may impugn the heritage authority's decisions to deny a demolition permit on administrative law grounds. For example, if a land owner is concerned with the procedural aspects of the decision-making process he may have a remedy in terms of the Heritage Resources Act, or alternatively, PAJA.

5 4 The demolition of unlawfully occupied buildings

5 4 1 Introduction

Chapter 2 described the way in which demolition powers have been abused in the past to further the race-based spatial segregation ideals of the apartheid government. That chapter specifically referred to legislation, such as the notorious Prevention of Illegal Squatting Act 52 of 1951 (PISA), which required of local authorities and private land owners to demolish structures under the auspices of health, safety and planning regulation. PISA further inflated land owners' common law eviction and demolition powers by enabling them to raze structures that were erected or occupied on their land without their consent, even though they had not obtained a court order. These structures were often occupied by poor black South Africans who had moved to urban areas in search of employment. The actions of the local authorities and private land owners were usually not scrutinised by the courts, since PISA ousted their jurisdiction to hear eviction and demolition cases unless it could be shown that the occupier had a right or title to the land.[248]

Against this background chapter 2 showed that the eviction from, or the demolition of a person's home, is now a constitutional issue. Section 26(3) of the Constitution states:

> '[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.'

The Prevention of Illegal Eviction of Unlawful Occupiers Act 19 of 1998 (PIE) was enacted to give effect to section 26(3). With reference to the series of *Olivia Road*[249]

[248] Section 3B(4)(a) of Act 72 of 1977. Section 3B(4)(a) formed the centre of the dispute in *Vena v George Municipality* 1987 (4) SA 29 (C); *George Municipality v Vena and another* 1989 (2) SA 263 (A); *Mpisi v Trebble* 1992 (4) SA 100 (N) and *Mpisi v Trebble* 1994 (2) SA 136 (A).

[249] *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (1) SA 78 (W); *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (6) SA 417 (SCA) and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC).

and *Blue Moonlight*[250] cases, chapter 2 described how section 26(3) and PIE affect a land owner's right to obtain an eviction order and, by implication a demolition order, for an unlawfully occupied inner-city building. That chapter concluded that an owner of an occupied building will not always convince the court to order the eviction of unlawful occupiers, even if all PIE requirements have been complied with. The reason for this is that the court will take a range of factors into account when determining whether it would be just and equitable to order the eviction of the occupiers. These factors can, for example, include the apartheid abuses of eviction and demolition powers and the fact that eviction will render occupiers homeless. The delay in the demolition of a decaying structure under such circumstances may have serious consequences for a property owner who might not be able to afford the cost of restoring or maintaining the building or who planned on developing the stand once the old structure had been demolished.

With reference to the *Olivia Road* cases, chapter 2 further explained how section 26(3), read with section 26(1) and (2)[251] of the Constitution impacts on local authorities' duties to enforce health and safety legislation in urban areas. Chapter 2 concluded that a local authority cannot perform its health and safety duties in isolation from its duty to provide the poor and vulnerable with access to adequate housing.[252] In particular, local authorities must comply with the requirements set for a lawful eviction in PIE before they can proceed to demolish unhealthy and unsafe structures. A court has the discretion to grant an eviction order if it is just and equitable to do so after it had considered all

[250] *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* 2009 (1) SA 470 (W); *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) *and City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA).

[251] Section 26(1) of the Constitution determines that '[e]veryone has the right to have access to adequate housing.' Section 26(2) determines that the state must take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right to access to adequate housing.

[252] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC) para 44. See the discussion in chapter 2, section *2 3 2 3*.

relevant circumstances.[253] This implies that the court will not necessarily be persuaded to order the eviction of unlawful occupiers – to enable the demolition of the decaying structure – purely because of unhealthy and dangerous circumstances.[254]

The constitutional analysis in this section comprises of three parts. It firstly focuses on the interaction between property owners' section 25(1) rights, which they hold in relation to their unlawfully occupied building or land, and the occupiers' section 26(3) rights. This section is written from the land owners' perspective and it shows that a court must conduct a two-stage constitutional enquiry when section 25(1) property rights and section 26(3) rights are in conflict. The first stage of the enquiry involves the balancing of land owners' section 25(1) rights with the unlawful occupiers' section 26(3) rights. In *Port Elizabeth Municipality v Various Occupiers*[255] the Constitutional Court explained that:

> '[t]he judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case'.[256]

A court must proceed to the second stage of the enquiry once it has considered all the relevant circumstances as prescribed in PIE and when it finds that it cannot order the eviction of the unlawful occupiers. In the second stage of enquiry, the court must apply the *FNB* methodology to establish whether the continued unlawful occupation of the owners' land or buildings amounts to an unconstitutional deprivation of the land owner's

[253] *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (1) SA 78 (W) para 29. See further, section 4 and 6 of the Prevention of Illegal Eviction of Unlawful Occupiers Act 19 of 1998.

[254] This was confirmed in *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 25 and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC) illustrate that a range of factors can influence the courts discretion in relation to eviction proceedings. See the discussion of the latter case in chapter 2, section 2 3 2 3.

[255] 2004 (12) BCLR 1268 (CC).

[256] 2004 (12) BCLR 1268 (CC) para 23.

property. This section applies the *FNB* methodology to the *Blue Moonlight* cases to determine whether an owner will be arbitrarily deprived of his property if the court delays the eviction of the unlawful occupiers.

Secondly, this section determines when the local authority's duty to enforce health and safety legislation trumps property owners' section 25(1) rights and occupiers' section 26 rights. Finally, the constitutional analysis considers the rights of the occupiers of inner-city buildings. This section specifically considers whether the unlawful occupiers of unhealthy and unsafe inner-city buildings possess constitutional property interests in those structures, as prescribed by *FNB*. One can continue to determine whether the eviction will cause an arbitrary deprivation of the occupiers' property if it is found that they have constitutional property interests in the structures that they occupy. Case law has confirmed that not all the occupiers of buildings destined for demolition are unlawful.[257] It is, therefore, necessary to determine whether the lawful occupiers will be arbitrarily deprived of property when they have been evicted and the building is demolished.

5 4 2 The owners of unlawfully occupied buildings

5 4 2 1 Balancing section 25 and section 26(3) rights

It is clear that when it comes to the demolition of unlawfully occupied structures, two competing constitutional rights become relevant, namely the land owner's section 25(1) rights and the unlawful occupiers' section 26(3) rights. In the renowned case of *Port Elizabeth Municipality v Various Occupiers* (*Port Elizabeth Municipality*)[258] the Constitutional Court explained how a court should resolve a dispute where private property rights clash with the unlawful occupiers' right not to be arbitrarily evicted from their home. The court firstly sketched the historical and constitutional context against which evictions disputes should be adjudicated. It explained that homelessness can to some extent be ascribed to the apartheid government's abuse of the demolition and

[257] *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (1) SA 78 (W) para 10.

[258] 2004 (12) BCLR 1268 (CC). Refer to Van der Walt AJ *Constitutional property law* (2005) 424-426 and to Van der Walt AJ *Property in the margins* (2009) 154 for a discussion of this renowned case.

eviction powers that were created in legislation such as the Prevention of Illegal Squatting Act 52 of 1951 (PISA). Section 26(3) was adopted to address the injustices brought about by apartheid policies[259] and PIE was enacted with the 'objective of overcoming the above abuses and ensuring that evictions in future took place in a manner consistent with the values of the new constitutional dispensation'.[260] PIE has to be interpreted against this historical and constitutional background.[261] Moreover, PIE must be understood and applied within 'a defined and carefully calibrated constitutional matrix'.[262] Both section 25 and section 26 of the Constitution form an integral part of this constitutional matrix. The court explained in relation to section 25 that racist laws during the apartheid era blatantly disregarded property rights. By contrast, the new constitutional era requires of the state and private persons to fully respect property rights. These rights should also be understood in the context of the need 'for the orderly opening-up or restoration of secure property rights for those denied access to, or deprived of them in the past.'[263] Section 26(3) confirms that one should have respect for a person's place of abode and it acknowledges that a home is more than just a shelter but a 'place of personal intimacy and family security'.[264] The courts must establish a constitutional relationship between section 25 (property rights) and section 26 (housing rights) of the Constitution.[265]

There are three features of the manner in which the Constitution approaches the tension between land hunger, homelessness and respect for property rights.[266] Firstly, the 'rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self-enforcing'.[267] Legislation has been enacted to gradually strengthen tenure rights, to make land available and to

[259] 2004 (12) BCLR 1268 (CC) paras 8-11.

[260] 2004 (12) BCLR 1268 (CC) paras 11-14.

[261] 2004 (12) BCLR 1268 (CC) para 11.

[262] 2004 (12) BCLR 1268 (CC) para 14.

[263] 2004 (12) BCLR 1268 (CC) para 15.

[264] 2004 (12) BCLR 1268 (CC) para 17.

[265] 2004 (12) BCLR 1268 (CC) para 19.

[266] 2004 (12) BCLR 1268 (CC) para 20.

[267] 2004 (12) BCLR 1268 (CC) para 20.

provide adequate housing progressively. The Constitution does not permit the arbitrary seizure of land by the homeless or the state.[268] Secondly, section 26(3) acknowledges that people can be evicted from their homes, even if it results in them becoming homeless.[269] Finally, section 26(3) emphasises the need for the court to find concrete case-specific solutions for the complicated disputes that can arise.[270] The Constitution essentially imposes new obligations on a court when it comes to adjudicating an eviction case where section 25(1) and section 26 rights clash. In particular, the court cannot automatically give preference to ownership rights. The Constitution created a new and equally relevant right, namely the right not to be arbitrarily evicted from one's home. It is the duty of the court to reconcile and balance section 25(1) and 26 rights once it has taken all the relevant circumstances and case-specific factors into account.[271] PIE is the legislative guide that assists the courts in adjudicating these disputes.[272]

Port Elizabeth Municipality indicates that, in a dispute of this kind, ownership will not necessarily weigh more than unlawful occupiers' section 26(3) rights and that each case has to be determined with reference to its unique set of facts and circumstances. The situation can arise where, after considering all the relevant circumstances, the court finds that it is not just and equitable to order the eviction of the occupiers. In such instances, the court will have the discretion to delay the eviction until a later stage. This means that at the moment of the enquiry, the occupiers' section 26(3) rights outweigh the owner's section 25(1) rights. For example, the high court in *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another*,[273] held that it

[268] 2004 (12) BCLR 1268 (CC) para 20.

[269] 2004 (12) BCLR 1268 (CC) para 21.

[270] 2004 (12) BCLR 1268 (CC) para 21.

[271] 2004 (12) BCLR 1268 (CC) para 23.

[272] This approach was set out in *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) and was followed in *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (1) SA 78 (W) and *Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC) (*Olivia Road*). See the discussion of the latter decision in chapter 2, section *2 3 2 3*.

[273] 2009 (1) SA 470 (W).

could not even hear the application for eviction, since it would be unable to determine whether it would be just and equitable to evict the unlawful occupiers from the applicant's property. This could be ascribed to the fact that the city had not provided the court with a report where it explained how it would accommodate the evictees.

As explained above, the continued unlawful occupation of private property can place a great burden on the owner insofar as he is unable to use or to develop that property. Moreover, the continued unlawful occupation of a property can impose an additional financial burden on the owner. He would not only be unable to use his property, either for himself or to generate income, but he would also have to maintain that building and perhaps even pay for amenities used by the occupiers. It is necessary to determine whether an owner will be deprived of property if he has applied for an eviction order, but where the court finds that it is neither just nor equitable to order the eviction of the occupiers. Furthermore, if there is a deprivation of property, it is necessary to establish whether that deprivation complies with section 25(1).

5 4 2 2 Arbitrary deprivation of property

In *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another*,[274] the court explained that section 26 of the Constitution does not permit the state to 'either abdicate or thrust its responsibilities to provide adequate housing onto the private sector, nor does it suggest that the private sector is obliged to itself indefinitely provide housing without compensation'.[275] The court does have the discretion under section 4 of PIE to temporarily delay the eviction of the unlawful occupiers from private land. The exact period of delay depends on the circumstances of the case.[276] Apart from *Modderklip*, there has been no definite indication of when the delay in eviction will disproportionately burden the owner. Although *Blue Moonlight* is not a perfect example of substantive arbitrariness in a dispute concerning the unlawful occupation of private land, there are certain features of the case that will shed some

[274] [2010] ZAGPJHC 3 (4 February 2010).

[275] [2010] ZAGPJHC 3 (4 February 2010) para 97.

[276] [2010] ZAGPJHC 3 (4 February 2010) para 103.

light on this particular issue. *Blue Moonlight* is also significant because of the controversy surrounding the constitutional damages awarded to the owner of the building by the South Gauteng High Court.[277] This discussion therefore draws from *Blue Moonlight* to show that an owner is deprived of property when the court delays the eviction of unlawful occupiers. Furthermore, with reference to *Blue Moonlight* the discussion below delineates some of the factors that may be relevant when determining whether the delay in eviction constitutes a substantively arbitrary deprivation of property.

According to the *FNB* methodology, one must determine whether a land owner is deprived of property when a court delays the eviction of unlawful occupiers because it decides that it is not just or equitable to grant the eviction order. One can proceed to scrutinise the continued unlawful occupation of land in light of section 25(1), if it is found that it amounts to a deprivation of property. This means that one must ascertain whether the deprivation is imposed in terms of law of general application, and further, whether that specific interference with property rights is, in fact, authorised by that law. Once this has been established, one can proceed to determine whether the deprivation is substantially arbitrary because the law of general application does not provide 'sufficient reason for the particular deprivation in question or is procedurally unfair'.[278]

It has already been explained that, at the first hearing of the *Blue Moonlight* case, the court decided that it could not even hear the application for eviction because the city's housing plan would not accommodate the evictees. The court could only determine whether it was just and equitable to evict the occupiers once it was certain that the city would at least provide the unlawful occupiers with temporary alternative accommodation. This in effect meant that at that stage of the dispute, the owner was expected to indefinitely tolerate the occupiers on its property. Stated differently, there was not an exact time when the unlawful occupation of the property would come to an

[277] Refer to chapter 2, section 2 3 for a comprehensive discussion of this case.

[278] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

end. During the second round of the eviction proceedings,[279] the South Gauteng High Court emphasised that *Blue Moonlight* had purchased the unlawfully occupied property for redevelopment purposes which required the demolition of the existing structures. These structures, consisting of a factory, office block and outbuildings, were in particularly derelict state.[280] In fact, the owner had received a notice from the local authority calling on it to ensure that its property met the health and safety standards set in legislation.[281] Moreover, *Blue Moonlight* was forced to forego use of its land at no cost, which meant that it could not even make a return on its investment. Essentially, *Blue Moonlight* had been 'deprived' of the right to use and to develop its property.[282] The court concluded that 'without the ability to evict, there is no realistic prospect that Blue Moonlight can regain possession of its property. Effectively the property will be lost'.[283] As a result, the court ordered the eviction of the occupiers, but it suspended the operation of the order for a three-month period. It further held that it was bound by the *Modderklip*[284] decisions and ordered the city to pay the owner constitutional damages equivalent to the loss of rental income for the time that the building was unlawfully occupied.

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another*, [285] the Supreme Court of Appeal postponed the operation of the

[279] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010). Refer to chapter 2, section *2 3 3 1* for a discussion of this case.

[280] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) para 167.

[281] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) para 21.

[282] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) para 162.

[283] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) para 190.

[284] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

[285] 2011 (4) SA 337 (SCA).

eviction order for an additional two-month period. The court also set aside the South Gauteng High Court's finding (on the basis of the *Modderklip* decision) that the city was liable to pay constitutional damages.[286] Specifically, the court reasoned that the *Blue Moonlight* differed from the *Modderklip* decision, because in the former case the owner obtained an eviction order which would not be difficult to enforce.[287] By contrast, the sheer number of occupiers and nonchalant attitude of the police and local authority made it practically impossible for the *Modderklip* owner to evict the occupiers. Unlike the owner in *Modderklip*, the owner in *Blue Moonlight* would have the full use and enjoyment of his property once the occupiers were evicted. Another fundamental difference was that the *Modderklip* owner was the victim of blatant land invasion and it took immediate steps to procure the eviction order. The owner in *Blue Moonlight* had purchased the property at a time when it was already occupied. It appears as if the Supreme Court of Appeal was of the view that on the one hand, the *Blue Moonlight* owner was, to some extent, responsible for its own fate. *Modderklip* on the other hand, had no control over its circumstances and it had no means to protect its property interests. The court concluded that it was, as a result, justifiable to order the constitutional damages in the case of *Modderklip* but not in the case of *Blue Moonlight*.

One can argue that in the case of *Blue Moonlight* the land owner was, at least temporarily, deprived of a property interest for purposes of section 25(1) because the unlawful occupation of the property interfered with the owner's right to use and to exploit the land for commercial purposes. This argument is supported by the fact that the property was of an industrial nature, purchased for purposes of redevelopment. However, because of the unlawful occupation of its property, the land owner had to postpone its demolition and redevelopment plans. This was problematic because the owner had received a local authority notice calling on it to remove the dangerous conditions that existed on its property by either demolishing the structures or restoring

[286] For a discussion of this aspect of the Supreme Court of Appeal's judgment, refer to chapter 2, section *2 3 3 2*.

[287] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA) paras 70-73.

the buildings.[288] Failure of the owner to comply with the notice amounted to an offence under the relevant by-law.[289] The applicant contended that it was economically unviable to restore the building so that it met the requisite statutory standards.[290] Furthermore, the continued unlawful occupation of its property placed a financial burden on the owner since it was unable to realise its investment. Finally, the land owner submitted that contrary to the arguments laid before the court, it had not received any rental payments from the occupiers. Accordingly, it could not be said that the applicant had consented to the occupation of the structures.[291] Collectively, these factors indicate that the temporary unlawful occupation of the land constituted a deprivation of Blue Moonlight's property interests. This deprivation was imposed by the respective courts when they postponed the eviction of the occupiers on the basis of PIE.[292] The deprivation – the delay in the enforcement of an eviction order – was authorised by law of general application, namely PIE. The next step is to determine whether, after the Supreme Court of Appeal's decision, it can be said that Blue Moonlight was deprived of property in a manner that was substantively arbitrary.

As stated above, a deprivation of Blue Moonlight's property interests will be substantively arbitrary if there is insufficient reason for that deprivation. *FNB* made it explicit that 'sufficient reason' has to be established with reference to the complexities of the relationships involved in the dispute.[293] The Constitutional Court in *FNB* further provided eight contextual factors that are relevant in a substantive arbitrariness

[288] [2010] ZAGPJHC 3 (4 February 2010) para 21.

[289] [2010] ZAGPJHC 3 (4 February 2010) para 21.

[290] 2009 (1) SA 470 (W) para 18.

[291] 2009 (1) SA 470 (W) para 17.

[292] Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 regulates evictions at the instance of private land owners. Section 4(6) provides that the courts may order the eviction if it finds that it is just and equitable to do so after having considered all the relevant circumstances. Section 4(8) further enables the court to determine the date when the eviction order should be enforced.

[293] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

enquiry.[294] Specifically, one must consider the relationship between the means (the deprivation) and the end (the purpose of the deprivation) and further, the relationship between the purpose of the deprivation and the person that is affected. As explained above, the *Blue Moonlight* owner was deprived of its right to use and exploit its property from the time when he first attempted to obtain an eviction order (October 2007)[295] until the eviction order was granted and finally enforced (July 2011).[296] The purpose of the deprivation was to enable the court to give effect to the unlawful occupiers' section 26(1) rights as circumscribed in PIE. In particular, the delay in eviction afforded the local authority time to show to the court, by way of a report, how it would accommodate not only the *Blue Moonlight* occupiers, but other unlawful occupiers in future once they were evicted from private land.[297] The intent of the court was to compel the city to reconsider and restructure its existing resources and housing policies more actively. This measure was necessary to facilitate the dynamic involvement of the city in resolving the inner-city housing shortage. The period of delay further enabled the unlawful occupiers to make their own attempt at locating alternative accommodation.[298]

When considering the relationship between the purpose of the deprivation and the affected person, one should take into account that Blue Moonlight purchased the property at a time when it was already unlawfully occupied. Blue Moonlight was therefore aware of the fact that it would have had to obtain an eviction order, which would not necessarily have been a speedy process, before it could proceed with its redevelopment plans. In this regard, the court of first instance explained that 'under the

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[294] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See this regard the explanation in section 5 1 2 above.

[295] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* 2009 (1) SA 470 (W) para 2.

[296] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA) para 77.

[297] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* 2009 (1) SA 470 (W) para 66.

[298] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) para 194.

new constitutional dispensation evictions have taken on a new character in that a landowner cannot enforce his property rights as and when he likes'.[299] Blue Moonlight was, in other words, not an 'innocent victim of land invasion',[300] but rather a property developer who bought the property, perhaps bargaining on a reduced price, conscious of the fact that it was unlawfully occupied. Accordingly, there is a strong relationship between the court's attempts to protect the interests of the unlawful occupiers and Blue Moonlight.

FNB further requires one to consider the relationship between the purpose of the deprivation, the nature of the property and the extent of the deprivation in relation to such property.[301] The deprivation constituted a considerable interference with property rights. However, the unlawful occupation of Blue Moonlight's property was temporary. There was no indication that the owner would have struggled to enforce the eviction order. The owner would have been able to continue with its demolition and redevelopment plans once the eviction order was executed on the stipulated date. Given the significant purpose of the deprivation (protecting the interests of vulnerable and poor occupiers) and the circumstances under which Blue Moonlight purchased the property, this deprivation – although extensive – does not appear to be an overly excessive interference with property rights.

FNB states that there has to be a more compelling purpose to justify a deprivation if it relates to land and corporeal movables than in the instance where the property is something else. The deprivation in question did affect the owner's right to enjoy and exploit his land. Nevertheless, taking into account the centrality of the availability of land and the concomitant issue of homeless in the post-apartheid context, the purpose fulfilled by the deprivation was, under the circumstances, comparatively more important that the protection of the land owner's use entitlement. Likewise *FNB* provides that there

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[299] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* 2009 (1) SA 470 (W) para 42.

[300] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA) para 71.

[301] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

will have to be a more compelling purpose for the deprivation if it embraces all the incidents of ownership than in the instance where it only embraces some ownership entitlements.[302] The paragraphs above have already underscored the importance of safeguarding the interests of the unlawful occupiers by delaying the eviction proceedings. It suffices to say that the deprivation in question, although impacting on the ownership of land, did not affect ownership in its entirety. Rather, the deprivation temporarily suspended the owner's right to commercial exploitation of its property. By contrast, the immediate eviction of the unlawful occupiers would have resulted in their becoming homeless. Alternatively, summary eviction could even have resulted in the occupiers seeking shelter in yet another privately-owned building only to face eviction at a later stage yet again.

Finally, *FNB* prescribes that it might be necessary to conduct either a rationality or a proportionality enquiry into the means and ends depending on the interplay between the purpose of the deprivation, nature of the property and extent of the deprivation. With reference to the arguments set out above, one can argue that in the case of *Blue Moonlight* that, by delaying the eviction process, the respective courts did not impose a disproportionate burden on the land owner. Admittedly, the deprivation had far-reaching consequences for Blue Moonlight since it had to delay its redevelopment plans for about three and a half years. Blue Moonlight was also unable to put its property to any other income-producing use during the period of unlawful occupation. However, this burden is offset by the fact that Blue Moonlight had known that the property was unlawfully occupied when it purchased the land and that it was aware (or should have been aware) of the fact that eviction disputes often take years to resolve, especially if, as in this case, the unlawful occupiers are relatively settled. By postponing the eviction, the court safeguarded the unlawful occupiers' right to a dignified livelihood. In this case, the *Blue Moonlight* owner's commercial interests weighed less than the occupiers personal interests. Finally, another indication that the deprivation was not disproportional was that the owner was not completely deprived of his ownership entitlements since they were only deferred for the period of unlawful occupation. Blue Moonlight could presume

[302] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

its commercial activities upon the eviction of the occupiers. To conclude, Blue Moonlight was not arbitrarily deprived of its property.

Blue Moonlight shows that, whether or not an owner will be arbitrarily deprived of property when he cannot evict unlawful occupiers will depend on the unique circumstances of the case. From *Blue Moonlight*, one can isolate some of the factors that will be relevant in a substantive arbitrariness enquiry. A factor that will weigh in favour of a finding of arbitrariness is when there is no clear indication of whether the unlawful occupation of the land will ever come to an end, or where it is practically impossible to evict the occupiers because of their numbers and the duration of the occupation. Such a situation can arise where, as in *Modderklip*, the owner cannot enforce the eviction order because of circumstances beyond his control. Alternatively, a court can simply find that it is not just or equitable to order the eviction of the occupiers because of their personal circumstances. Another relevant factor is the impact that the unlawful occupation of land will have on the land owner. As in the *Blue Moonlight* case, this can refer to the economic or financial implications of the continued occupation of the building. In particular, it seems as if a court is more likely to find that the delay in eviction imposes an arbitrary deprivation of property if the owner no longer has any economic use for the land. Related considerations are the nature of the property and the reason why the owner holds that property, as well as the reason for not evicting the occupiers before. A court will, for example, take into account that the unlawfully occupied property is of an industrial nature which can only be put to more productive use once the occupiers are evicted. A court would arguably be less inclined to find that the owner was unconstitutionally deprived of property when as in *Blue Moonlight* the owner only holds the property for investment purposes. The same line of reasoning applies when the unlawfully occupied property forms part of several properties held for purely financial reasons. Other considerations are the duration of the unlawful occupation of the property and the circumstances under which the building became occupied. Specifically, a relevant factor would be whether the owner initially consented to the occupation of his building or chose to turn a blind eye to the unlawful occupiers on his land. This factor ties in with whether the owner had taken active steps to firstly, prevent the unlawful occupation of his land and, secondly, to secure the eviction of the

occupiers. A decisive factor in *Blue Moonlight* was that the owner purchased the already unlawfully occupied building and that it had not fallen victim to deliberate land invasion. Finally, a court will take into account that an owner had attempted to abandon his property.[303] This is not a closed list of factors and any other facet of a case can influence the outcome of the substantive arbitrariness test.

Clearly, there is no *per se* rule that dictates when the delay in eviction will impose a disproportionate burden on the owner. Each case will have to be analysed with reference to its case-specific circumstances. One can conclude that in the future there will be instances where the delay in eviction will result in an arbitrary deprivation of property, just as there will be cases where land owners will be expected to put up with a delay in evicting the occupiers. As explained above, *Port Elizabeth Municipality v Various Occupiers*[304] emphasised that the Constitution does not permit the arbitrary seizure of land by the state on behalf of homeless persons or arbitrary eviction of occupiers by land owners.[305] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was promulgated to protect both the rights of the occupiers and that of land owners. Nevertheless, PIE does not provide for the protection of land owners' interests in instances where it is neither just nor equitable to order the eviction of the occupiers, or to permit the continued unlawful occupation of private property for a substantial period of time. Stated differently, PIE does not incorporate a mechanism that will alleviate the otherwise disproportionate burden that is imposed on the owner in some instances when the courts delay the eviction of the occupiers. The implication is that PIE can potentially authorise an substantively arbitrary deprivation of property that may give rise to a situation similar to what O' Regan J had in mind in *Reflect-All 1025 CC v Member of the Executive Council for Public Transport,*

[303] Refer to Sonnekus JC 'Abandonnering van die eiendomsreg op grond en aanspreeklikheid vir grondbelasting' 2004 *TSAR* 747-757 for an overview of the legal implications of abandoning land.

[304] 2004 (12) BCLR 1268 (CC).

[305] 2004 (12) BCLR 1268 (CC) para 20.

Roads and Works, Gauteng Provincial Government (*Reflect-All*).[306] The concomitant implication is that there is a possibility that PIE can be impugned in a constitutional challenge on the basis of section 25(1). Such a constitutional challenge can only be avoided if there is a way to assuage potentially disproportionate burdens that some owners will bear when the eviction order is not granted or cannot be enforced.

In *Modderklip* the Supreme Court of Appeal attempted to mitigate the excessive interference with the owner's property rights by awarding a constitutional damages order. Similarly, the South Gauteng High Court in *Blue Moonlight*[307] attempted to alleviate what it perceived to be an unreasonable intrusion into property rights, by ordering the city to pay constitutional damages to the owner.[308] These compensatory awards are similar to the German equalisation measures (*Ausgleich*)[309] referred to in chapters 2 and 4, in that they were specifically crafted to ease the extreme interference with property rights caused by the continued unlawful occupation of the owners' land.[310] The German equalisation measures are statutory creations designed to prevent the

[306] 2009 (6) SA 391 (CC). Refer to section 5 1 2 for a discussion of the case. O' Regan J decided that section 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 section 10(3) imposed an arbitrary deprivation of property insofar as it did not make provision for a periodic review process where the proposed road network could be scrutinised. O' Regan was of the view that the inclusion of such a review process would prevent the legislative scheme from imposing disproportionate burdens on land owners.

[307] *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010).

[308] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA) the Supreme Court of Appeal set aside the South Gauteng High Court's constitutional damages order because it did not consider Blue Moonlight's burden disproportionate as was the case in *Modderklip*.

[309] Refer to Van der Walt AJ *Constitutional property law* 3 ed (2011) 277-281 and 366-367 for an explanation of how German law incorporates equalisation payments to soften the effects of excessive regulatory interference into property rights. Van der Walt also explains how the compensatory award granted in *Modderklip* resembles equalization payments.

[310] Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 43-44. Chapter 4 referred to the infamous German case *BVerfGE* 100, 226 [1999] (the *Rheinland-Pfälzisches Denkmalschutz-und-Pflegegesetz* case), where the German Federal Constitutional Court explained how an equalisation measures would have prevented a heritage preservation law from imposing a disproportionate burden on property owner.

imposition of disproportionate burdens on land owners by a specific piece of legislation.[311] A general compensation provision in legislation does not qualify as an *Ausgleich* measure. An equalisation sum should also be distinguished from compensation for the expropriation of property or delictual damages.[312] An *Ausgleich* measure prevents lawful state action (taken in terms of legislation), with an otherwise important public function, from being declared unconstitutional.[313] A properly drafted equalisation measure also provides a list of factors which indicates when a land owner's burden will be too excessive. It will also show the court how to calculate the equalisation sum.

The compensatory awards ordered by the South African courts are useful because they can be tailored to the specific circumstances of the case. It would, however, be more beneficial to incorporate an equalisation-style measure in PIE.[314] There are several considerations that support this argument. As stated above, PIE should protect the rights of both the occupiers and the private land owner. An equalisation measure will extend the scope of the protection afforded to land owners and unlawful occupiers by PIE. Such a measure will enable the courts to prevent the state from arbitrarily seizing private property on behalf of the homeless. This in turn will enable the courts to protect the rights of the unlawful occupiers more effectively, since they would be able to remain on the property until they can be provided with other accommodation. Alternatively, they would be able to remain on the property until the local authority decides to expropriate the property for social housing purposes. The courts do not have the power to order the expropriation of private property but courts can indirectly compel the local authority to

[311] Van der Walt AJ *Constitutional property law* 3 ed (2011) 366-367; Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 236-239 and Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 43.

[312] Van der Walt AJ *Constitutional property law* 3 ed (2011) 367. See to the same effect, Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 118 and Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 42.

[313] Van der Walt AJ *Constitutional property law* 3 ed (2011) 278 and 367 and Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 43.

[314] There are examples of equalisation-style measures that have been incorporated into South African legislation. Refer to section 5 3 2 footnote 230 in this regard.

consider the possibility of expropriation when it orders the payment of constitutional damages. Moreover, a carefully designed equalisation provision will provide more legal certainty. Currently, it is unclear as to when it is justified to order the payment of constitutional damages. An equalisation provision will circumscribe the instances when the courts would be able to grant a monetary award that will soften the effects of the continued unlawful occupation of private land. Finally, PIE fulfils an indispensable function as it was enacted to give practical effect to section 26(3) of the Constitution. The incorporation of an equalisation measure will prevent PIE from being declared unconstitutional insofar as it authorises the imposition of disproportionate burdens on land owners.

In conclusion, private land owners' section 25 rights and unlawful occupiers section 26(3) often clash. An owner would typically apply for an eviction order in terms of PIE when his land is unlawfully occupied. A court would conduct a balancing enquiry (as prescribed by *Port Elizabeth Municipality*) to determine whether it would be just and equitable to order the eviction of the occupiers. The court has the discretion to delay the eviction once it has considered all the relevant circumstances. This delay can, depending on the unique circumstances of the case, result in a substantively arbitrary deprivation of the land owner's property rights. Furthermore, PIE has the potential to impose a substantively arbitrary deprivation of property insofar as it does not regulate the instance where it is neither just nor equitable to order the eviction of the occupiers or to permit the continued unlawful occupation of private land. In such instances, the South African courts have sometimes ordered the payment of constitutional damages in an attempt to protect land owners' property rights. These compensatory awards are comparable to German equalisation payments. It would arguably be more beneficial to incorporate a German-style equalisation provision in PIE, since it will extend the protection afforded to both private land owners and unlawful occupiers by the Act. It will also provide more legal certainty, as it will circumscribe the instances when the delay in eviction will impose disproportionate burden on the owner. More importantly, the equalisation provision will prevent PIE from being challenged on the grounds that it authorises an arbitrary deprivation of property.

5 4 3 When will local authorities health and safety duties trump sections 25(1) and 26(3) rights?

There are instances where the local authorities' statutory health and safety duties outweigh section 25(1) and section 26(3) rights.[315] This would be where, for example, a building is so dangerous and dilapidated that it is necessary to request the owner to either renovate or demolish the structure. Section 12(1)(a) of the National Building Standards and Building Regulations Act 103 of 1977 (the Building Standards Act) provides that if a building is dilapidated or in a state of disrepair the local authority may by way of written notice request the owner to alter or to secure the building within a specified period of time so that it no longer poses a threat to the public. Alternatively, the local authority may request the owner to demolish the building.[316] If the local authority is of the view that the building is so unsafe or dangerous, it can take 'such steps' without serving a notice and reclaim the costs of repair or demolition from the owner.[317]

The demolition of a privately-owned structure at the instance of the local authority amounts to a deprivation of property. This deprivation does not raise an authority issue since section 12 authorises the local authority to take the relevant steps to remove health and safety threats caused by decaying buildings and building works, if necessary

[315] Van der Walt AJ *Constitutional property law* 3 ed (2011) 214 explains that it is generally accepted that the state has the power to regulate property interests for purposes of public health and safety. The regulation can cause extensive losses for the property owner. These losses are not compensated because they affect all property owners in more or less the same way. A regulation will be unconstitutional in the circumstance when it places a disproportionate burden on the owner.

[316] In terms of section 12(4)(a) of Act 103 of 1977 the local authority can, by way of written notice, request the property owner to, within the specified period, remove any persons occupying a dangerous or dilapidated structure.

[317] Section 12(1)(a) of Act 103 of 1977. In terms of section 12(4)(b), the local authority can, by way of written notice, request any person occupying an unhealthy and unsafe building to vacate the premises within the specified time period. It is unclear whether this section should be read with section 21 of Act 103 of 1977, which prescribes that the local authority can apply to the magistrate's court for an order enabling it to demolish a building, if it is satisfied that the erection of the building 'is contrary to or does not comply with the provisions of this Act or any approval or authorisation granted thereunder'.

by demolition. The next step is to determine whether the demolition of a building, at the instance of the local authority, amounts to a substantively arbitrary deprivation of property.

A deprivation will be arbitrary if, in terms of *FNB's* complex relationships test, it is found that the law of general application does not provide sufficient reason for that specific interference with property rights.[318] *FNB* states that one must firstly consider the relationship between the deprivation and the purpose of the deprivation and further, the relationship between the purpose of the deprivation and the effect that it has on the land owner.[319] There is a direct relationship between the demolition of the property (the deprivation) and the purpose of the deprivation, namely to ensure safe and healthy urban areas. A decaying building can not only pose a threat to the safety of the public and to the owner himself, but it can also disfigure the area where it is situated. Demolition is arguably the most effective way to remove this threat if the building cannot be altered to comply with health and safety by-laws. The effect that the demolition will have on the land owner is context specific. On the one hand, the removal of the structure can have far-reaching consequences for the owner; if he lives in the building, the demolition of the structure will result in the loss of his home. On the other hand, the owner might only hold the land for investment purposes. The demolition of the building in these circumstances will not necessarily have such a harsh effect on the owner. Importantly, demolition would only be a last resort measure and it is likely that the local authority would, on more than one occasion, have called on the owner to maintain his property according to the requisite standards. This means that the owner would have received prior warnings before his building was demolished. Furthermore, the owner does not have the right to use his property in a manner that harms others. The owner has an obligation to either maintain his property or, alternatively, demolish dangerous structures.

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[318] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[319] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

FNB further indicates that one should consider the relationship between the purpose of the deprivation, the nature of the property and the extent of the deprivation in relation to that property.[320] If a dilapidated building is situated in a congested urban area, such as a central business district, it will pose an imminent threat to the public in general and to any person who might take up occupation in the structure. Demolition will be an efficient way to remove this danger in instances where the building cannot be renovated. The purpose of the deprivation, together with the nature of the property (buildings in overcrowded urban areas) weighs heavier than the protection of the land owner's interest by allowing the building to stand. As stated above, it is unlikely that the local authority would request the demolition of a structure if it had not previously requested of the land owner to remedy the dangerous and unhealthy conditions created by his buildings. In overcrowded urban areas, where buildings are likely to become unlawfully occupied it is vital for the local authorities to remove the threat posed by unsafe and unhealthy buildings. In so doing, the local authorities protect the interests of marginalised persons who would attempt to take up occupation in the structure.

The deprivation in question interferes with the ownership of land and, according to *FNB*[321] there will have to be more compelling reasons to justify this deprivation than in instances where the property is something less extensive. In this instance there are weighty public interest considerations that will trump the land owner's individual interests in the decaying structure. Demolition will significantly interfere with the land owner's entitlements, but he will not neccessarily be deprived of all ownership entitlements. The land owner will still have the land available for development or speculation purposes. Moreover, the deprivation seeks to protect the lives and property of others and in the case of overcrowded urban areas (such as Johannesburg CBD), the lives of poor and vulnerable South Africans. By contrast, demolition may only have financial implications for land owner and it will not necessarily impact his livelihood in any significant way. The purpose of the deprivation, considering all the circumstances,

[320] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[321] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

is sufficiently compelling to justify the interference with ownership. These considerations ties in with the next *FNB* factor, namely that the there has to be more compelling reason for the deprivation if it embraces all the incidents of ownership. Whether the demolition of the structure embraces all the incidents of ownership is contingent on the case-specific circumstances. If on the one hand, the land is purely held for speculation purposes, demolition will hardly impact on ownership entitlements. On the other hand, demolition can also encompass nearly all the incidents of ownership. An owner could, for example, have owned a flat in a building destined for demolition. In this instance, demolition will effectively deprive the owner of everything except a share in the land on which the building once stood. This deprivation may nevertheless be justified given the important purpose of the deprivation (the health and safety of the owner and the public in general), and the fact that demolition is typically a last resort measure. Collectively, the abovementioned considerations indicate that demolition will not amount to a substantively arbitrary deprivation of property.

Importantly, a property owner might successfully prove that he was arbitrarily deprived of property if he can show that the local authority had previously not requested him to renovate his property. In such an instance the land owner may also have a remedy on the basis of procedural fairness and PAJA. The deprivation in question – the demolition of a dangerous and unhealthy structure – is caused by administrative action, the local authority's decision to demolish the building. If an aggrieved land owner seeks an administrative justice remedy, he will have to show that the administrative action did not meet the requirements set out in the Building Standards Act or in Promotion of Administrative Justice Act 3 of 2000 (PAJA). PAJA and procedural fairness may be the preferred remedy, in instances where the local authority failed to request of the land owner to remove the unhealthy conditions caused by his building. Similarly, PAJA, rather than section 25(1) may provide the basis for a more compelling case in instances where the building was demolished despite some procedural shortcoming or irregularity in the local authority's decision-making process.

As explained above, in *Olivia Road* the court confirmed that the local authority cannot perform its health and safety duties in isolation from its section 26 duties. The court further explained that it will no longer automatically grant eviction orders on proof

of unhealthy or unsafe circumstances. It will only order the eviction of the occupiers if it is just and equitable to do so after it has considered all relevant circumstances. It is beyond the scope of this study to determine when a building will be sufficiently dangerous for a court to order the eviction of the unlawful occupiers of that structure. It suffices to say that the section 26(3) rights of these occupiers will not be infringed if the local authority has followed the correct procedures, as set out in PIE, to obtain the eviction order. A local authority can specifically apply for an urgent eviction order in terms of section 5 of PIE if the continued occupation of the dangerous building poses an imminent threat to the lives of the occupiers.[322] The unlawful occupiers' section 26(3) rights will be infringed if they were evicted even though the local authority had not followed the necessary procedures. In such instances, the unlawful occupiers can have the local authority's decision to evict set aside on review on the basis of one of the grounds listed in section 6 of PAJA.

5 4 4 The occupiers of decaying inner-city buildings

Case law has shown that unlawful occupiers can reside in inner-city buildings for years before they are evicted.[323] They often invest money and labour to make these sometimes dilapidated and dangerous buildings habitable. This raises the question: do unlawful occupiers have a constitutional property interest in the building that they occupy? It is doubtful as to whether the unlawful occupation of a building will cause a

[322] Urgent eviction orders are provided for in section 5 of Act 19 of 1998. Section 5(1)(a) provides that a property owner or the person in charge of land can apply for an urgent eviction order if there is a 'real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land'. In terms of section 5(2), the court must give written and effective notice of the intention of the owner or the person in charge to obtain an eviction order to the unlawful occupier and the municipality in whose jurisdiction the land is situated. Section 5(3) states that the notice must, amongst other things, indicate that the unlawful occupier is entitled to appear in court to defend the case and where necessary the occupier can apply for legal aid.

[323] In *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* 2009 (1) SA 470 (W) the occupiers resided on the property for two years before the owner initiated eviction proceedings.

constitutional property interest to vest in the occupier. It is also unclear whether the creation of a constitutional property right would actually benefit the occupier. One can argue that unlawful occupier will lose the protection afforded to him by PIE if he possesses a constitutional property interest in the occupied property. The reason for this is that if he holds a constitutional property interest, his occupation of that building will become lawful. Furthermore, the onus would fall on the occupier to protect his constitutional property rights when he is evicted from the building. PIE, by contrast, places the onus on the local authority, or the owner of the building, to show that it would be just and equitable to order the eviction of the unlawful occupiers. Arguably, there are other provisions in the Bill of Rights (such as section 26 or section 33 of the Constitution) that adequately protect the rights of unlawful occupiers. Accordingly, it serves no purpose to declare that unlawful occupiers possess constitutional property rights in the structures that they occupy because their rights are adequately protected by section 26(3) and PIE.[324]

One cannot assume that all the occupiers of buildings destined for demolition are unlawful occupiers. In *City of Johannesburg v Rand Properties (Pty) Ltd and others*,[325] the court explained that at least 'some' of the occupiers are unlawful.[326] One can deduce that the other occupiers were perhaps tenants or even owners of their respective units. It is also possible that some of the occupiers had some form of consent to remain on the property. Tenants or owners of decaying inner-city structures have constitutional property rights in buildings destined for demolition. The local authority's decision to demolish causes a deprivation of these property rights. As explained in section 5 4 3 above, this deprivation does not give rise to an authorisation issue. The law of general application, section 12 of the Building Standards Act, authorises the local authority to take the necessary steps to remove health and safety threats brought about by dangerous and decaying structures, if necessary by way of demolition. One can accordingly proceed to determine whether the law of general application provides

[324] Kellerman M *The constitutional property clause and immaterial property interests* unpublished LLD thesis Stellenbosch University (2010) 97-99.

[325] 2007 (1) SA 78 (W).

[326] 2007 (1) SA 78 (W) para 11.

sufficient reason for the deprivation. This has to be established with reference to the complexities of the relationships involved in the dispute. A court would have to analyse the interaction between the deprivation (demolition), the purpose of the deprivation (public health and safety), extent of the interference with property rights (demolition may result in the loss of a home), and nature of the property (residential in overcrowded urban area). In essence, the substantive arbitrariness enquiry will take on the same form as in section 5 4 3. Factors that will have a bearing on the outcome of this test is, for instance, whether the building could be altered or renovated to remove the dangerous conditions and, further, the immediacy of the danger posed by the structure. Whether or not the decision to demolish will amount to a substantively arbitrary deprivation of property depends on the balancing of the unique circumstances relevant to the dispute. Importantly, owners' or tenants' interests will have to yield to the greater public interest in a safe and healthy urban environment if a building cannot be renovated or altered (for whatever reason) and if it is so dangerous that it poses an imminent threat to the lives of others. In such instances, demolition will not amount to an arbitrary deprivation of property because there will be sufficient reason for the specific interference with property rights.

Apart from the substantive arbitrariness enquiry, owners and tenants may have a remedy on the basis of administrative justice. The deprivation in question (the demolition of the structure) is caused by administrative action, the local authority's decision to remove the threat posed by the building. As in section 5 4 3, an aggrieved land owner or tenant will have to show that the administrative action does not meet the requirements set out in the Building Standards Act or the Promotion of Administrative Justice Act 3 of 2000 (PAJA) if they want to attack the administrative action in terms of PAJA.

5 5 Conclusion

The underlying theme of this chapter is that the state has the power to regulate the ownership of land and property in the public interest. In so doing, the state can place far-reaching limitations on the exercise of ownership entitlements. Ownership is not an

absolute right and it has to yield to the prevailing needs of society. For example, legislation restricts the owner's right to build on, or develop, his land. More specifically, zoning laws and conditions of title defines the nature of development on land. The National Building Standards and Building Regulations Act 103 of 1977 (the Building Standards Act) regulates the quality of building works undertaken by the land owner as it compels him to submit building plans for approval. Collectively, these mechanisms ensure the sustainable and harmonious development of towns and cities. Likewise, historic preservation laws curtail the land owner's right to demolish or alter certain buildings because they have historic or cultural value. Furthermore, anti-eviction legislation such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), limits the owner's right to obtain an eviction order insofar as it requires of him to temporarily tolerate the continued unlawful occupation of his land in certain instances. Logically, the unlawful occupation of land can have negative consequences for the owner, who would, for example, be unable to demolish buildings on the property so that he can continue to develop his land. This interference is nevertheless justified in light of the important role that anti-eviction laws play in the South African context.

There are four aspects of this chapter, pertaining to the constitutionality of state interferences with property rights, which deserves a final mention. Firstly, it is imperative to emphasise that a deprivation will often not raise a constitutional issue because the *law of general application* does not, in fact, *authorise* the specific interference with property rights. This means that there are instances where it is unnecessary for litigants to rely on constitutional provisions such as section 25(1) and section 33 to protect their property rights from excessive state interferences. This would be where the regulatory law does not actually authorise the deprivation or the administrative action, which gave rise to the specific deprivation of property. In such instances, it is sufficient to argue that the particular interference with property rights was not authorised by the law of general application and that it is, therefore, unlawful. For example, section *5 2 3 2* argued that the local authority is unauthorised to approve building plans in conflict with conditions of title, restrictive covenants or other regulatory laws. The approval of plans under these circumstances, results in a deprivation of the neighbouring land owners' constitutional

property rights. However, instead of arguing their case on the basis of section 25(1) or section 33, neighbouring land owners can simply show that the local authority acted beyond the powers created by the Building Standards Act. In so doing, neighbouring land owners can have the decision to approve the plans set aside because it was unlawful. In any event, the principle of subsidiarity precludes direct reliance on a constitutional right if legislation has been enacted to protect that right.

Secondly, this chapter underscored the centrality of the *FNB* non-arbitrariness test in a section 25(1) enquiry. The *FNB* test is a nuanced text, which directs the courts to conduct an in-depth analysis of the complexities of the relationships involved in the dispute. It further directs the court to balance and reconcile the interests that are affected by the specific deprivation. In so doing, the court can determine when a regulatory law cannot be applied inflexibly because it leads to unjust and inequitable results. The *FNB* substantive arbitrariness enquiry showed that the demolition of the building in *Camps Bay Ratepayers and Resident's Association v Harrison* (*Camps Bay*)[327] would have disproportionately burdened the owner, even though her building was in principle partially illegal. Similarly, with reference to the *FNB* test, sections 5 3 and 5 4 showed that the rigid enforcement of the National Heritage Resources Act of 25 of 1999 (the Heritage Resources Act) and of PIE respectively, can result in the substantively arbitrary deprivation of property. The Heritage Resources Act enables the heritage authority to exercise its discretion in favour of denying the land owner's application for a demolition permit, even if it deprives the owner of all economically viable use of his property. PIE provides that the court can order the eviction of occupiers from private land if it finds that it is just and equitable to do so once it has considered all the relevant circumstances. The court's decision to not grant the eviction order can result in a substantively arbitrary deprivation of property if there is no clear indication of when the unlawful occupation of the land will cease. In both instances, the results of the substantive arbitrariness analysis led to the conclusion that PIE and the Heritage Resources Act may be vulnerable to constitutional attack on the basis of section 25(1).

[327] [2010] ZASCA 3 (17 February 2010).

This is regrettable since both acts address a specific need of society, namely the dignified treatment of unlawful occupiers and the preservation of heritage resources.

Thirdly, this chapter highlighted the valuable role that equalisation measures can play in South African law. The Supreme Court of Appeal attempted to mitigate the otherwise excessive loss or harm caused by lawful state action when it ordered the state to pay constitutional damages to a land owner.[328] These constitutional damages are comparable to the German equalisation payments which are specifically designed to prevent legislation from imposing disproportionate burdens on land owners.[329] This chapter argued that it would be beneficial to incorporate equalisation provisions in legislation such as PIE and the Heritage Resources Act, because it would prevent a finding that these acts are unconstitutional on the basis of section 25(1). The courts cannot order the expropriation of property when a regulatory measure causes an excessive interference into property rights. Arguably, the courts can indirectly compel the state to consider or reconsider the possibility of expropriation when they order it to pay an equalisation sum to the affected land owner. Moreover, an equalisation measure will enable the courts to simultaneously protect the rights of the owner and to meet the goals set out in the specific act. For instance, the incorporation of an equalisation measure in PIE will allow the courts to better protect the rights of the owner and of the unlawful occupiers. It is beyond the scope of this dissertation to determine the exact nature and scope of equalisation measures, but it suffices to say that there is a shortcoming in South African law insofar as it does not often incorporate statutory measures designed to mitigate excessive losses caused by otherwise legitimate laws. It is vital to develop the South African law so that it expressly addresses the situation where disproportionate burdens are imposed on land owners by laws that fulfil a significant function in the South African society.

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[328] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA)

[329] Van der Walt AJ 'Regulation of building under the Constitution' (2009) 42 *De Jure* 32-47 at 42-43.

Finally, this chapter described the interaction between section 25(1) remedy and remedies rooted in administrative justice provisions, incorporated into the authorising laws or in PAJA. Specifically, this chapter distinguished between deprivations that are caused by legislation and those that are caused by administrative action. It concluded that deprivations often occur as a result of administrative action and in such instances a land owner will be able to assert his rights either on the basis of section 33 of the Constitution (administrative justice) as embodied in PAJA or, alternatively, on the basis of section 25(1). A section 25(1) remedy remains preferable if the deprivation (caused by administrative action) is substantively arbitrary because of the impact that it has on the land owner. However, administrative justice may provide a more compelling line of attack if the deprivation is substantively arbitrary because of a procedural shortcoming or irregularity. A deprivation of neighbouring land owner's property rights can, for example, be caused by the local authority's failure to demolish an illegal building.[330] Likewise, a land owner is deprived of his property rights when the heritage authority finds that it cannot issue a demolition permit for a historic building.[331] These decisions can be impugned on administrative justice grounds if they do not meet the standards set for administrative justice in the authorising law or in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The administrative action can subsequently be set aside on review, subject to the condition that the owner first resorted to remedies provided in the authorising law.

[330] Refer to section *5 2 3 2* in this regard.

[331] Refer to section 5 3 2 in this regard.

Chapter 6:
The social responsibilities of the land owner

6 1 Introduction

Legislation, statutorily authorised regulation and rights of others can place substantial limitations on an owner's use, enjoyment and exploitation of his land. Conditions of title, restrictive covenants and legislation such as the National Building Regulations and Building Standards Act 103 of 1977 (Building Standards Act), limit a land owner's ability to develop and use his land. Recent case law has shown the courts' willingness to order the demolition of buildings that have been built in conflict with the law.[1] By contrast, the National Heritage Resources Act of 25 of 1999 (Heritage Resources Act) not only limits owners' right to demolish historic buildings but also places a positive obligation on owners, in certain circumstances, to restore and maintain protected buildings. Similarly, within the context of unlawfully occupied buildings, property owners' right to demolish buildings on their land may be subject to obtaining an eviction order, which in turn is subject to the provisions of the Prevention of Illegal Eviction of Unlawful Occupiers Act 19 of 1998 (PIE). Owners of unlawfully occupied buildings must therefore first obtain eviction orders in terms of PIE before they can proceed to demolish those buildings. Case law has shown that circumstances can prevent owners from evicting unlawful

[1] *High Dune House (Pty) Ltd v Ndlambe Municipality and others* [2007] ZAECHC 154 (29 June 2007); *Barnett and others v Minister of Land Affairs and others* 2007 (6) SA 313 (SCA); *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE); *Van Rensburg NO and another v Equus training and consulting CC and another* [2009] ZAECPEHC 50 (25 September 2009); *Searle v Mossel Bay Municipality and others* [2009] ZAWCHC 9 (12 February 2009) and *Van Rensburg NO v Naidoo NO* [2010] ZASCA 68 (26 May 2010).

occupiers even though they are otherwise entitled to, or had obtained, eviction orders.[2] The implication is that the owners' demolition (and possibly development) plans could be placed on hold for a lengthy, if not indefinite, period of time.

This chapter investigates the justification for placing certain limitations on land owners' right to use their land. More specifically, this chapter aims to provide a theoretical explanation for the reasons why land owners should, on the one hand, be compelled to demolish unlawful and illegal buildings but, on the other hand, be prohibited from demolishing historic or unlawfully occupied buildings. The central premise of the chapter is that land owners have certain obligations when it comes to the use of their land. These obligations include the duty to comply with legislation that is designed to ensure the harmonious and sustainable growth of towns and cities. As the custodians of historically valuable buildings, land owners have the obligation to protect and preserve those buildings for future generations. In some instances owners also have a duty to tolerate the temporary unlawful occupation of their land. This in turn has a bearing on land owners' plans to demolish unlawfully occupied structures. Importantly, these obligations are not without boundaries and there are instances where it is unreasonable to expect of owners to demolish illegal or partially illegal buildings. Likewise, there are instances where the burden of taking responsibility for historic preservation and for the continued unlawful occupation of buildings might disproportionately burden land owners. In such circumstances, the community has the duty to mitigate the otherwise excessive interference with property rights.

This chapter firstly describes the social-obligation norm as developed by Alexander.[3] The chapter relies on Alexander's theory to explain why limitations are

[2] In *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) the court granted an eviction order but suspended its operation for two months to afford the city time to provide the occupiers with alternative accommodation. In *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) the owner did obtain an eviction order. However, the sheer number of unlawful occupiers was one of the factors that prevented the owner from enforcing the eviction order.

placed on land owners' rights in specific circumstances. Secondly, the chapter argues that land owners have a duty to demolish buildings that have been built in breach of conditions of title and legislation. This section also provides a brief overview of the arguments raised by law and economics scholars in relation to the enforcement of restrictive covenants. The third section applies Alexander's social-obligation norm to explain why land owners have a duty to protect historic buildings. The section on historic preservation further outlines other arguments in relation to land owners' duty to preserve culturally valuable buildings. The fourth section aims to explain why land owners' right to demolish unlawfully occupied structures can be limited in certain instances. As a point of departure, this section draws on the well-known decision of *Port Elizabeth Municipality v Various Occupiers* (*Port Elizabeth Municipality*)[4] and applies Alexander's social-obligation theory to explain the limitations on land owners' demolition rights. It also considers the distinction drawn by Radin[5] between fungible and personal property, which might be useful to explain why land owners' rights should, in some instances, yield to the rights that others have in relation to their land. Finally, each section, namely illegal buildings, historic preservation and unlawfully occupied buildings, describes the limits of the obligations that the community may impose on land owners.

6 2 Alexander's social-obligation norm

With reference to the noxious-use doctrine, Alexander argues that American courts have always implicitly given effect to the social-obligation norm, although they have

[3] See in this regard Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) and Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820. Alexander's social obligation norm is comparable to the German constitutional rule that property owners have rights as well as obligations. This is explicitly stated in Article 14 of the German Basic Law. See the discussion in chapter 4, section 4 5 1.

[4] 2004 (12) BCLR 1268 (CC).

[5] Radin MJ developed the concepts of personal and fungible property in 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015.

never expressly acknowledged its existence.[6] In terms of the noxious-use doctrine, regulatory action will not be compensated if the statutory regulation is designed to abate public nuisances or noxious uses of property.[7] Alexander explains that the rationale for the noxious-use doctrine is that the ownership of property does not confer on private individuals the right to use their property in a way that harms the public.[8]

The decision in *Lucas v South Carolina Coastal Council* (*Lucas*)[9] has raised uncertainty as to the relevance of the noxious-use doctrine in modern takings law. In that case the US Supreme Court reduced the value of the doctrine when it explained that the 'harmful or noxious-use analysis' was merely a 'progenitor' of the court's more modern statements to the effect that the state can regulate land use, without compensation, if it 'substantially advances legitimate state interests'.[10] In *Lucas* the court also developed an exception to the *per se* rule that a regulation will cause a taking if it extinguishes all economic use of the land. The court held that the state can resist the payment of compensation for a regulation that destroys all economic use of the land if it can show that the 'proscribed use interest' never formed part of the land owner's title.[11]

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[6] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 757 argues that the courts have occasionally employed obligation language in their judgments, but there is nothing in US law that resembles a constitutional norm that the owner has a social responsibility to use his property in such a manner that he does not undermine the greater well-being of the community.

[7] Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 76 explains that the noxious-use doctrine has been criticised because it is difficult to determine whether regulations are nuisance abating or benefit conferring. If a regulation confers benefits on the state, then the *per se* rule will not be applicable.

[8] Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 76.

[9] US 505 1003 (1992).

[10] US 505 1003 (1992) 1023-1024.

[11] US 505 1003 (1992) 1027 and 1029-1030. With reference to existing nuisance and property law principles, the state can prove that the owner never had the right to use his property in the proscribed way. New legislation, which deprives the owner of all economic use of his land, must merely confirm the position in existing nuisance and property law principles.

Alexander argues that both the noxious-use doctrine and the *Lucas* nuisance exception are rooted in the notion that ownership contains an inherent social obligation.[12] Furthermore, both these principles recognise that 'landownership does not confer on individuals a privilege to impose harms on the community of such a nature

[12] South African authors have also argued that ownership is not an absolute right and that it is accompanied by certain obligations. Visser DP 'The absoluteness of ownership: the South African common law perspective' 1985 *Acta Juridica* 39-52 at 43-48 argues that ownership in the South African context has never been an absolute right and that it has always had to yield to the demands placed on it by society. An owner has always had, for example, the duty to use his property in a manner that would not cause harm to his neighbours. Lewis C 'The modern concept of ownership of land' 1985 *Acta Juridica* 241-266 at 243-244; 248-249 and 260-262 argues that the concept of ownership as *plena in re potestas* has been radically altered by the common law and legislation. She explains that the right to use property has never been unfettered in Roman and Roman-Dutch law, as is evidenced by the restrictions placed on ownership entitlements by neighbour law. The limitations imposed on ownership, and the concomitant obligations imposed on the owner, have evolved as the needs of society changed. Lewis refers to *Kings v Dykes* 1971 (3) SA 540 (C) 545, where the court explained that in a 'modern world' an owner may not use his land in a manner that would be detrimental to his neighbours or to his community. Moreover, the owner holds his land in trust for future generations. Legislation, such as town-planning and environmental conservation laws, is designed to ensure that the owner does not use his land in a manner that would undermine the public interest. Lewis reasons that it is necessary to establish a balance between private rights and social responsibility. Likewise, Van der Walt AJ 'The effect of environmental measures on the concept of landownership' (1987) 104 *SALJ* 469-479 at 476-479 argues that it seems as if it has been accepted that the concept of landownership in South Africa has changed and 'that change implies the limitation of ownership by social duties and restrictions deriving from various interests in society' such as the public interest in the conservation of the environment. Van der Walt explains that it is essential to develop a new conceptual framework 'within which current developments in conservation (and planning) legislation may be explained satisfactorily'. It is, therefore, necessary to determine whether ownership in South Africa should be viewed as an 'unbound' right which can be narrowed down by legislation, or alternatively, whether it should be viewed as an inherently limited right. The framework that Van der Walt has in mind accommodates the view that the limitations imposed on ownership for conservation purposes do not amount to 'limitations of the owner's theoretically unlimited right, but as natural duties and limits inherent in ownership of land as such'. For example, the duty to preserve historic buildings should be seen as flowing from the ownership of that specific property. Van der Walt concludes that to introduce this new conceptual framework, it might be necessary to incorporate a statutory principle that has been adopted in Western European legal systems. This principle states that ownership of land implies not only rights but also duties.

that, by social consensus, the common good is substantially undermined'.[13] Alexander is of the view that the state's ability to restrict the manner in which owners use their property without paying compensation 'is best explained by the notion that owners inherently owe society certain obligations'.[14] Accordingly, courts should focus on the obligations of ownership instead of relying on limitations that are inherent to the title to land.[15]

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[13] Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 227-228.

[14] Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 77. Singer JW *Entitlement: the paradoxes of property* (2000) 3-18 makes a similar argument in relation to the social obligations of the land owner. He argues that the ownership model, which has been accepted by academic scholars and even the courts, encourages land owners to use their property without having regard to the interests of other land owners and non-owners. The ownership model refers to the notion that generally, owners can do whatever they want with their property. Other persons and institutions are always responsible to explain why limitations are imposed on the exercise of ownership entitlements. Moreover, other persons or institutions, and even the government, must refrain from interfering with property rights. The ownership model 'abhors' obligations and it is premised on the belief that property rights have a built-in structure and content. Accordingly, it is easy to assimilate when regulatory action limits the existing rights of the land owner. However, ownership conflicts, and will always conflict, with other legally protected interests. Singer notes that these conflicts raise questions of 'political and moral judgment *inside* the property system itself' and instead of determining whether ownership should be regulated, one should answer a more fundamental question, namely 'what kind of property system to create in the first place'? A legal system that enables land owners to exercise their rights without regard to the rights of others will 'be a legal system in name only'. Singer explains that land owners have rights as well as obligations. A land owner may be morally and legally obligated to use his land in a manner that is beneficial to others. More specifically, the land owner has obligations toward other owners and to non-owners. Singer concludes that '[o]wners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist'. See also Singer JW *Entitlement: the paradoxes of property* (2000) 197-216.

[15] Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 230 and to the same effect Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 757. In the latter article, Alexander explains that *Lucas v South Carolina Coastal Council* US 505 1003 (1992) represents the thin conception of the social obligation norm.

Alexander explains that to fully develop a social-obligation norm, society must have a 'social vision' or a 'substantive conception of the common good'.[16] This conception will operate as the 'fundamental context' for the exercise of rights and duties pertaining to ownership.[17] He discusses two conceptions of the social-obligation norm, namely a 'contractarian version of the community-based social obligation norm'[18] and a conception based on the notion of human flourishing and the social obligation of ownership.[19] Alexander proposes the adoption of the second, thicker conception of community, based on the Aristotelian notion that to flourish human beings need to belong to a group.[20] He stresses two characteristics of human flourishing. Firstly, human beings can only develop the capacity that is essential for a 'well lived human life' in a

[16] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 757.

[17] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 757. Alexander concedes that there are many competing conceptions that describe what is good for society. It is because of this conflict that 'the substantive scope of the social obligation of ownership is highly and inevitably contestable'.

[18] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 758-76. In this regard Alexander relies on a conception of community developed by Dagan H 'Takings and distributive justice' (1999) 85 *Va L Rev* 741-804 at 741, in support of his explanation. Dagan's theory strongly supports the notion of individualism. Communities are networks of autonomous individuals who are drawn together so that they can realise certain shared goals. The community is only formed so that it can maximise the welfare of the individual. In terms of this conception, the community can only make demands on the individual if that demand will repay each member of the group. This community cannot expect a sacrifice from the individual if he will not be compensated.

[19] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 760-773. See to the same effect Alexander GS and Penalver EM 'Properties of community' (2008) 10 *Theoretical Inquiries in Law* 127-160 at 138-141.

[20] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 760. Singer JW *Entitlement: the paradoxes of property* (2000) 12-14 also emphasises that owners operate within a broader community and that the system of property law governs the relationships between people. In fact, the property law system will cease to exist if there are no longer human relationships and interests to sustain it. Singer notes that the tensions which inform property law are the tensions inherent in social relationships. These relationships evolve as society changes and, as a result, the property system is likely to change. Furthermore, the problems in property law are often resolved by understanding the connection between property and human relationships.

society that is dependent on other human beings.[21] Secondly, a human being will flourish if he is able to choose 'among alternative life horizons' and if he is able to reflect and to determine the value in each of the alternatives.[22] Alexander argues that a person cannot develop the ability to differentiate between all the available life horizons on his

[21] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 761 explains that 'community is constitutive of human flourishing in a very deep sense' and that 'perhaps community even comprises humanity'.

[22] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 762. A person can only develop the capability to distinguish between life horizons through others who teach discernment directly or by their example.

own. A person cannot secure the capabilities[23] or acquire the resources necessary for human flourishing on his own either.[24] The reason for this is that the process of

[23] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 762-765 draws from the 'capabilities approach' developed by Nussbaum and Sen as a basis for his account of human flourishing on which the thicker conception of community is built. See Nussbaum MC *Woman and human development: the capabilities approach* (2000); Sen AK *Commodity and capabilities* (1985). The 'capabilities approach' measures a person's well-being with reference to what he can do and not with reference to what he has. Alexander at 763 explains that a 'well-lived life conforms to certain objectively valuable patterns of human existence and interaction, or what Sen calls "functionings" rather than a life characterised by the possession of particular goods, the satisfaction of particular (subjective) preferences, or even without more, the possession of particular liberties'. Nussbaum and Sen draw a distinction between 'first-order patterns' that constitute 'well-lived human lives' or 'functionings' and 'second-order freedom' to 'function in particular ways, which they call "capabilities"'. Alexander GS and Penalver EM 'Properties of community' (2008) 10 *Theoretical Inquiries in Law* 127-160 at 138 and 148-149 identify four capabilities which they consider vital to human flourishing. These capabilities are life (which includes the subsidiary goods of health and security); freedom (which includes identity and self-knowledge); practical reason; and affiliation (which include subsidiary goods such as social participation, self-respect and friendship). They argue that these capabilities can only exist within a 'vital matrix of social structures and practices'. It is only within a community (which can include the state) that a person can obtain the necessary resources to flourish, so that he can become 'fully socialised' in the exercise of his capabilities. Alexander and Penalver argue that these capabilities prevent the state from excessively interfering with an individual's property rights. A community will prevent the abuse of an individual's property rights if it has proper respect for the capabilities that are necessary for human flourishing. For example, proper respect for 'human freedom' limits the interferences that the state 'ought to be permitted to make into the sphere of private decision-making'. Alexander and Penalver explain that they cannot clearly delineate the boundaries of state action. They can, however, say that the same principles that require the creation of an infrastructure where humans can flourish also provide a basis for limiting the demands that the state can make on individuals and smaller communities. There are two principles relevant to the state's right to regulate property interests for the common good. Firstly, the principle of subsidiarity, which means that the state cannot take on the functions that can be better performed by smaller communities. Secondly, it is necessary to prohibit arbitrary state action because doing so will protect individual dignity. There must, accordingly, be an objective standard in terms of which state action can be evaluated. One can argue that the 'objective standard' envisaged by Alexander and Penalver is comparable to the substantive arbitrariness test formulated by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. As explained in

development requires dependence on other people so that we can nurture the necessary capacity.[25] Stated differently, human beings are dependent on their communities not only for their physical survival, but also to be able to 'function as free and rational agents'.[26] Communities, including the state,[27] are the medium through which a person is able to attain the resources that are vital to human flourishing.[28]

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chapter 5, section 5 1 2, the substantive arbitrariness test provides an objective basis in terms of which a court can determine whether a regulatory law imposes a disproportionate and unconstitutional burden on a property owner.

[24] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 765. See to the same effect Alexander GS and Penalver EM 'Properties of community' (2008) 10 *Theoretical Inquiries in Law* 127-160 at 138.

[25] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 765 explains that this dependence does not only refer to the physical dependence on others. It includes life, freedom, practical rationality and sociality which can only exist in a 'vital matrix of social structures and practices'.

[26] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 766; Alexander GS and Penalver EM 'Properties of community' (2008) 10 *Theoretical Inquiries in Law* 127-160 at 139.

[27] Alexander GS and Penalver EM 'Properties of community' (2008) 10 *Theoretical Inquiries in Law* 127-160 at 145-147 explain that the state is also a community. The state does have coercive power which can undermine human flourishing if it is permitted to expand without limit. Overly invasive governmental powers can have the effect of weakening other social matrices that provide the resources that are necessary for the exercise of human capabilities. The role of the state as a 'community' has become more important in a modern capitalist society. A capitalist system does not provide individuals with all the resources they need to develop the capabilities vital to human flourishing. This can be ascribed to the fact that a capitalist society is dependent on voluntary sacrifices, which is insufficient to supply all members of society with the necessary resources. It is, therefore, desirable for the state to compel individuals to contribute to the social structures that are conducive to human flourishing.

[28] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 766.

Another important function of the community is that it creates a society that is characterised 'by the just-social relations within it'.[29] Moreover, the community recognises that all persons are entitled to flourish. This means that all persons must have access to the resources and capabilities that enable them to prosper.[30] A member of such a community has a duty to assist others in obtaining these resources.[31] The reason for this is that if a person, as a rational agent, considers his own right to flourish 'valuable', he will be 'committed' to help others to flourish insofar as they are also rational human beings.[32] Rationality compels a person to acknowledge that all human beings should have access to the capabilities necessary to flourish and that this

[29] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 767 explains that 'just social relations' refers to a society where persons can interact with one another in a manner that is in accordance with the values of equality, dignity, freedom, respect, justice and autonomy. Communities create just social-relations by 'shaping social norms not just individual preferences'. See to the same effect Alexander GS and Penalver EM 'Properties of community' (2008) 10 *Theoretical Inquiries in Law* 127-160 at 140.

[30] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 768. See to the same effect Alexander GS and Penalver EM 'Properties of community' (2008) 10 *Theoretical Inquiries in Law* 127-160 at 140-141.

[31] Cowen DV *New patterns of landownership: the transformation of the concept of landownership as plena in re potestas* (1984) 71-80 argues that the owner has certain obligations when it comes to the use, exploitation and enjoyment of his land. The owner has these obligations because he is a member of a community or of several communities. In this regard, Cowen at 80 explains that 'no man is an island; and membership of a community involves certain obligations'. Importantly, the obligations that the owner has in relation to his property vary according to the nature of the object owned. Cowen reasons that the owner will have the right to destroy a leg of mutton or a piece of firewood. By contrast, the owner has a social obligation to refrain from destroying land. He explains at 71 that 'land-hunger or the hunger and thirst for the loveliness of a nature area, cannot be adequately satisfied by dwelling upon a theoretical right to destroy land. Here the power to enjoy and to use sensibly, and here the social obligations of ownership, are of the essence.'

[32] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 769. See to the same effect Alexander GS and Penalver EM 'Properties of community' (2008) 10 *Theoretical Inquiries in Law* 127-160 at 140-142.

imposes obligations on the individual to 'foster' the development of others.[33] Alexander explains that

> '[t]he major claim here, in short, is that our (and others') dependence creates, for us (and for them), an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible'.[34]

Alexander cautions that reciprocity does not necessarily accompany this social obligation.[35] The only form of reciprocity that can operate with the obligation is that the person, who gives to society, needs society and its related structures to continue his own development.[36] This raises the question: what can the community expect the

[33] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 769. See to the same effect Alexander GS and Penalver EM 'Properties of community' (2008) 10 *Theoretical Inquiries in Law* 127-160 at 142-143. Similarly, Singer JW *Entitlement: the paradoxes of property* (2000) 18 argues that property owners are both morally obligated to share the wealth with marginalised persons and to use their property in a way that is compatible with the interests of non-owners. In so doing, property owners assist non-owners to enter the system so that they too can become owners. This argument is justified on moral grounds and it is supported by the 'very arguments that support the recognition of property in the first place'. In this regard, Singer explains that the norms that justify the protection of property also justify the limitations imposed on property, which enables non-owners 'to become owners on relatively equal terms with those who can already claim legitimate property rights'. Singer's argument explains why, for example, it can be expected of land owners to temporarily tolerate the unlawful occupation of their land. See the discussion in section 6 5 3 below.

[34] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 770.

[35] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 770 provides the following reasons: firstly, the persons to whom we are expected to give are not always the persons from whom we have received. Secondly, even if the persons to whom we give are the same persons who gave to us, we will not necessarily receive the same amount that we gave.

[36] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 771 explains that individuals have social obligations because they are dependent on the community to which they give. What an individual gives is often determined by the needs of others and not necessarily by what he has given. Moreover, the person to whom an individual is obligated to give is not always a person who gave to that individual. See to the same effect Alexander GS and Penalver EM 'Properties of community' (2008) 10 *Theoretical Inquiries in Law* 127-160 at 143-144.

property owner to give for the greater good? Alexander holds the view that the owner is morally compelled to give to society, of which the owner is a member, 'those benefits that society reasonably regards as necessary for human flourishing'.[37] These benefits must, firstly, be a necessary prerequisite to enable the members of the community to flourish as moral agents and, secondly, 'have some reasonable relationship with ownership of the affected land'.[38] Alexander applies his theory to explain why, amongst other things, the government should have the power of eminent domain and regulatory powers to limit the rights of owners in relation to the use of his land. To summarise, Alexander argues that the social obligation norm may in some instances require of individuals to 'sacrifice some property interest to the community in exchange for monetary compensation'.[39] In such circumstances, Alexander reasons, ownership is protected by a liability rule instead of a property rule. Furthermore, there are some instances where (due to the operation of the social obligation norm as circumscribed in legislation) a land owner cannot use his property in manner that is detrimental to the broader community.

Singer, like Alexander, is also of the view that ownership is accompanied by certain obligations. He makes an argument, similar to the social obligation norm, to explain how the courts should resolve disputes concerning the taking of property. Singer refers to three models in terms of which takings disputes could be analysed, namely the castle model; the investment model and the citizenship model.[40] In terms of the castle model, ownership entitlements are clearly defined and protected from state interferences. These entitlements are fixed and their scope does not change according

[37] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 774.

[38] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 774.

[39] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 774-775.

[40] Singer JW 'The ownership society and takings of property: castles, investments and just obligations (2006) 30 *Harv Envtl L Rev* 309-338.

to social conditions or evolving values.[41] The investment model requires of the courts to determine whether a specific regulatory action interferes with the investment-backed expectations of the owner.[42] An owner is expected to factor in risks such as changing social values or new government-imposed obligations on, for example, development. Any regulatory measure that interferes with reasonable investment-backed expectations constitutes a taking of property. Singer criticises both these approaches because they can lead to different results, depending on the assumptions factored into the model. Essentially, these models do not assist in resolving takings disputes. Singer suggests that the third approach, the citizenship model, enables the courts to resolve takings disputes effectively.[43] This model accepts that property owners, as members of society, have inherent obligations as well as rights. These obligations can entail that the owner should refrain from doing certain things. It can also mean that the owner must act positively. For example, it can be expected of a land owner to adapt his building so that it is more accessible to disabled persons. Importantly, all obligations are not necessarily justified because they are demanded by the state or the community. The role of the court is to determine whether a specific obligation is fair and just. Singer emphasises that the owner should not be singled out to bear a burden that should be borne by the public in general. Singer concludes that every takings enquiry should start with the following question: is the obligation imposed on the owner just and fair? Arguably, in the South African context, the *FNB* substantive arbitrariness test enables the court to determine whether the land owner is disproportionately burdened by the statutory interference with his property rights. Explained differently, the *FNB* substantive arbitrariness test enables the court to determine whether, under the specific circumstances, an obligation imposed on the property owner is – in the words of Singer – just and fair.

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[41] Singer JW 'The ownership society and takings of property: castles, investments and just obligations (2006) 30 *Harv Envtl L Rev* 309-338 at 314-316 and 325-328.

[42] Singer JW 'The ownership society and takings of property: castles, investments and just obligations (2006) 30 *Harv Envtl L Rev* 309-338 at 314-316 and 325-328.

[43] Singer JW 'The ownership society and takings of property: castles, investments and just obligations (2006) 30 *Harv Envtl L Rev* 309-338 at 314-316 and 325-328 and 328-338

This chapter draws from Alexander' social obligation norm, with additions from other authors like Singer, to explain why an land owner can be compelled to demolish illegal and unlawful buildings and why certain limitations are imposed on the owner's right to demolish historic or unlawfully occupied structures. This chapter will also, with reference to Alexander and others, describe the boundaries of the regulation of demolition in the context of building and development controls, historic preservation statutes and anti-eviction laws.

6 3 Reasons for forcing a land owner to demolish unlawful and illegal buildings

6 3 1 Social obligation of the owner

Milton, like Alexander and Singer, recognises that an owner has certain obligations in relation to the use of his land.[44] These obligations are especially relevant in the field of planning law. The importance of planning law became evident during the Industrial Revolution when the influx of human beings into urban areas resulted in overcrowded, unhealthy and disease-ridden cities.[45] These circumstances were not conducive to human flourishing and it became necessary to improve the quality of life of everyone, including the urban poor, by eliminating nuisances and developing new towns that were specifically designed to avoid the deficiencies of the cities. Milton explains that planning law directly challenged the *laissez-faire* concept of ownership and as a result, the premise of this field of law became 'not the rights of ownership but its duties'.[46] Milton argues that due to the pervasiveness of land-use planning, property owners have come to expect that their rights can be limited by the state in the public interest.[47]

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[44] Milton JRL 'Planning and property' 1985 *Acta Juridica* 267-277. See to the same effect, Cowen DV *New patterns of landownership: the transformation of the concept of landownership as plena in re potestas* (1984) 71-80 and Van der Walt AJ 'The effect of environmental measures on the concept of landownership' (1987) 104 *SALJ* 469-479 at 476-479.

[45] Milton JRL 'Planning and property' 1985 *Acta Juridica* 267-277 at 267-268.

[46] Milton JRL 'Planning and property' 1985 *Acta Juridica* 267-277 at 275.

[47] Milton JRL 'Planning and property' 1985 *Acta Juridica* 267-277 at 276.

In light of the rapid rate of urbanisation, one can argue that land-use and building controls have become central to the creation of urban areas where human beings can flourish. This means that even more stringent demands are placed on the ownership of land in cities.[48] When using or developing their land, urban property owners have the duty to comply with legislation specifically designed to ensure the healthy and sustainable development of towns and cities. This duty is born from the social obligation of the owner to use his land in a manner that would not cause harm to his neighbours and to the greater community within which he functions.[49] One can further argue that a

[48] Cowen DV *New patterns of landownership: the transformation of the concept of landownership as plena in re potestas* (1984) 71 argues that the social obligations imposed on owners depend on the nature of the property owned. The ownership of, for example, a tractor will be subject to fewer restrictions than the ownership of land. Arguably, the ownership of a tractor will only be accompanied by the obligation to not use it in a manner that would cause harm to the life and property of others. The ownership of land, by contrast, will include a range of obligations. These obligations can arguably include the duty to preserve historic buildings or the environment; to develop the land in a safe and sustainable manner; or even to temporarily tolerate the unlawful occupation of land. See to the same effect Van der Walt AJ 'De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip: een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerende goed en dakloosheid' (1991) 17 *Recht en Kritiek* 329-359 at 352-354. See also *Odendaal v Eastern Metropolitan Local Council* 1999 CLR 77 (W) 84, where the court explained that the power that a person has in relation to his property has never been unfettered. However, 'rapid urbanization' and the 'inevitable need for regulation that has accompanied it has had the effect of restricting full dominium even further than the common law ever did'.

[49] Singer JW *Entitlement: the paradoxes of property* (2000) 210 and 216 explains that property confers power on individuals but it also creates obligations towards other property owners and non-owners. Obligations limit the power that is conferred on the owner. Power, in turn, limits the obligations imposed on property owners. The two concepts go hand in hand and one cannot have the one without the other. Singer reasons that to determine the entitlements of the land owner one must first ascertain the obligations he owes to society. This, Singer explains, is the paradox of property. Importantly, the obligations can change over time as the relationships between owners and non-owners evolve. Within the context of building and development law it is clear that the owner's entitlements are always subject to the limitations embodied in law. Singer's argument suggests that land owners must first determine the limits that are imposed on them by, for example, zoning laws so that they can ascertain what their right of ownership actually entails. The right to build in a manner proscribed by law (which delineates the obligations of the land owner) does not form part of the owner's entitlements.

land owner has a duty to remove the harm that he has caused to society. In *Reflect-All 1025 CC v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government*[50] O' Regan J explained that ownership is not an absolute right and that owners do not have the power to develop their land as they choose. She further explained that

> '[i]n our constitutional order, we recognise the social value of land to the community as a whole and accept that by affording people the right to own land, their rights are necessarily limited by the rights of the broader community'.[51]

In circumstances where the source of the harm is an illegal or unlawful building, the owner has a duty to either alter the building to bring it in line with the law or to demolish that building.

Likewise, a land owner will cause harm to his immediate neighbours and to other land owners in the township if he builds in breach of a restrictive condition. Van Wyk explains that restrictive conditions are inserted into the title deeds of properties to preserve the unique character of the neighbourhood.[52] The owner changes the character of the neighbourhood when he builds in breach of restrictive conditions. This in turn may lead to the diminution of property values in the area. On a more general level, the land owner undermines the public interest in the sustainable, orderly and harmonious development of neighbourhoods and towns if he interferes with these rights.

Illegal buildings are often unsafe and structurally unsound, which can pose a threat to the health and safety of the community. The illegally constructed shopping centre in

[50] 2009 (6) SA 391 (CC).

[51] 2009 (6) SA 391 (CC) para 106.

[52] Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 287; Van Wyk 'Removing restrictive conditions and preserving the residential character of a neighbourhood' (1992) 55 *THRHR* 369-385 at 372; Van Wyk J 'Revaluation of conditions of title: *Camps Bay Ratepayers Association v Minister of Planning Western Cape* 2001 (4) SA 294 (C)' (2002) 65 *THRHR* 642-649 at 646 and Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 660-661.

City of Tshwane v Ghani[53] posed a threat not only to the members of the public, but also to the employees who were working in the building. Illegal buildings can, as in the case of *Barnett and others v Minister of Land Affairs and others* (*Barnett*),[54] also cause permanent damage to the environment. Furthermore, when owners construct illegal buildings, they deprive their community, their neighbours and the general public of their right to safe and proper planned urban areas. Likewise, if his building plans have been set aside on review, the land owner has the responsibility to alter the building so that it does not adversely affect the rights of neighbours. If the building cannot be altered to comply with the law, the owner would have to demolish the illegal structure. Illegal and unlawful buildings hinder the creation of an environment where human beings can prosper. Accordingly, neighbours and members of the community have a direct interest in the development of property within the framework created by law.[55]

There is authority for the notion that a court has the discretion to order the payment of damages, instead of demolition, when buildings have been erected in

[53] 2009 (5) SA 563 (T).

[54] 2007 (6) SA 313 (SCA).

[55] *Reflect-All 1025 CC v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) para 106. In *Walele v The City of Cape Town and others* 2008 (11) BCLR 1067 (CC) para 2 the Constitutional Court explained that it was necessary to strike a balance between the rights of land owners to develop their land and the rights of neighbouring land owners. Such a balance must be maintained within the framework provided by the National Building Standards and Building Regulations Act 103 of 1977. The Constitutional Court in *Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC) had to determine whether it was permissible for the state, in its capacity as a private land owner, to establish a temporary transit camp for flood victims in an residential area (Kyalami) outside of Johannesburg. Kyalami was located in the vicinity of the Leeukop prison complex, where the government intended to accommodate the flood victims. The Constitutional Court held that, like other land owners, the state had to comply with environmental or town-planning legislation. These regulatory measures protect the rights of other land owners and the broader community and the state must apply for consent to establish the transit camp if it is required to do so by legislation. The rights of neighbouring land owners will be adequately protected provided the state, as a private land owner, adheres to the restrictions placed on it by the law.

conflict with conditions of title or restrictive covenants.[56] However, there are strong arguments favouring demolition of the building as the default remedy in these instances. Firstly, the payment of damages will not remove the deleterious effects of the illegal use of land.[57] Secondly, the payment of damages will not necessarily serve as an efficient deterrent to other land owners who want to put their properties to similar illegal uses. Thirdly, it might be problematic to determine who the beneficiaries of a damages order would be, since these types of restrictive conditions are only registered against the title deeds of the servient tenements.[58] Finally, a compensation award may only benefit immediate neighbours and not the entire affected community. Arguably, the demolition of the building would be the most effective way to restore the original qualities of the neighbourhood and, further, to protect the property rights of all the owners in the township.[59]

Van Wyk has argued that planning tools play an integral role in ensuring the orderly development of towns and cities. These tools can only be effective if adequate

[56] Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 661, with reference to *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd* 1971 (2) SA 397 (W) 405-407.

[57] *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE) paras 9-11; Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 661. Van Wyk explains with reference to the *Van Rensburg* case that a damages order would not remove the illegal use of the building and the character of the neighbourhood would change permanently. The changed character of the neighbourhood could lead to more illegal developments.

[58] Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 284f explains that restrictive covenants and conditions of title cannot be classified as praedial servitudes. One of the reasons for this is that restrictive covenants and conditions of title are only registered against the title deeds of servient tenements. There is no indication in the title deed of the servient tenement as to which erven constitute the dominant tenements. According to Van Wyk restrictive covenants in South Africa were developed in such a way that they were only registered against the title deeds of the servient properties without identifying the dominant tenements. Likewise, conditions of title are registered against the title deed without identifying the beneficiary of the condition.

[59] In *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SE) para 11 the court explained that the payment of damages will not restore the character of the neighbourhood.

enforcement mechanisms are available. One such enforcement mechanism is the demolition order.[60] In concurrence with Van Wyk, one can argue that a demolition order would be a particularly effective remedy to ensure that the rapid development of suburban and urban areas takes place within the framework created by the law.[61] Moreover, as in the case of restrictive conditions, demolition is the most efficient way in which the owner can begin to repair the damage that his illegal or unlawful building may have caused. In *Barnett* the surrounding environment could only be rehabilitated once the illegal cottages were demolished.[62] In *High Dune House (Pty) Ltd v Ndlambe Municipality and others*,[63] the court confirmed that demolition or partial demolition might be the only practical solution in instances where the building has been built in contravention of the Building Standards Act and where the position could not be regularised.[64]

It may sometimes seem exceptionally harsh to require of an owner to demolish an illegal or an unlawful building. The situation is best explained with reference to Alexander's social-obligation norm. As a member of a community the property owner is morally obliged to provide everything that is within his power to enable his community to flourish. A community can only flourish if all property owners in the area adhere to the limitations placed on their property rights by land-use and building controls such as conditions of title or zoning laws. When exercising his ownership entitlements, a land

[60] Van Wyk J 'Revaluation of conditions of title: *Camps Bay Ratepayers Association v Minister of Planning Western Cape* 2001 (4) SA 294 (C)' (2002) 65 *THRHR* 642-648 at 649. See to the same effect Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 662.

[61] Van Wyk J 'Contravening a condition of title can result in a demolition order' (2007) 70 *THRHR* 658-662 at 662 argues that the 'pressure to develop and redevelop land is gaining momentum' and that this 'invariably places pressure on the legal and administrative processes'. This situation is exacerbated when people illegally change the use of properties in disregard of conditions of title. She explains that development can only take place within the framework created by conditions of title and land-use plans. However, planning tools can only be effective if proper enforcement mechanisms such as the demolition order are available.

[62] 2007 (6) SA 313 (SCA) para 16.

[63] [2007] ZAECHC 154 (29 June 2007).

[64] [2007] ZAECHC 154 (29 June 2007) para 5.

owner is morally compelled not to harm the community of which he forms part.[65] This means that the owner has a duty to develop his land in such a way that does not compromise the sustainable and healthy development of his neighbourhood or town. Moreover, the property owner has a responsibility to maintain the communal structures that have enabled him to flourish. In essence, a land owner is obliged to demolish unlawful and illegal buildings situated on his property, because their existence frustrates the development of urban areas that are conducive to human flourishing. Additionally, the owner benefits from the limitations placed on other land owners in his neighbourhood, who are also compelled to demolish illegal and unlawful structures. All land owners in the community are equally responsible to create a community where all the members can thrive. To this extent, it is not unfair to impose regulatory restrictions on all land owners, even if they impose relatively harsh limitations on the owners' entitlement to use their property.

This conclusion also finds support in the comparable argument of Underkuffler.[66] She provides a model to explain why, in some instances, property rights should be protected more stringently from state intervention and why, in other instances, property rights should yield to the greater need of the public as circumscribed in legislation. This model is premised on what Underkuffler refers to as the operative conception of property. The operative conception of property does not strongly protect individual property interests. Rather, this conception of property reflects both the outcome of individual and collective tensions, which are determined and re-determined as circumstances change. Underkuffler's model has two legs, namely tier one and tier two. Tier one prescribes that property rights will have a presumptive power over a competing public interest, provided that the core values underlying the property interests and the public interest are different in kind. Stated differently, property rights will weigh stronger if they protect core values that are different from the values that underlie the public interest. Tier two provides that property rights will not have presumptive power over the

[65] Community, within this context, can refer to the neighbourhood where the owner's property is located but it can also refer to a national community. A property owner would form part of a national community if he is a citizen or if he owns property in the country.

[66] Underkuffler LS *The idea of property: its meaning and power* (2003) 62, 84-87 and 97-98.

public interest if the core values that underlie the property interest and the public interest are the same in kind. Underkuffler applies her model to show why the public interest in zoning laws trumps property rights. She explains that zoning laws regulate the owner's right to develop his land in a way that is harmful to the character of the area, 'or to the kind of community that the public (through elected representatives) has expressed a desire to become'.[67] When an owner opposes the limitations imposed by zoning laws two rights come into conflict, namely the 'property-rights claim of the owner' and the 'property-based interests of other owners, asserted through the public-interest control'.[68] Both claims are based on the physical use of land or the economic protection of the investment that land owners in a township have in their property. Underkuffler argues that because the core values that underlie these interests are the same in kind, there is no basis for assuming that the individual land owner's rights should trump the rights of other land owners in the area. The individual land owner's rights will therefore have to yield to the interests of the collective. Underkuffler explains that one cannot, in such instances, protect individual rights because the legal protection would depend solely on whether the rights are asserted by the individual or the collective. Furthermore, Underkuffler notes that:

> '[t]here is no reason why the property interests of one person should be presumptively superior to the property interests of many persons, simply because the interests of the many are asserted "publicly" or "collectively"'.[69]

Underkuffler's reasoning also explains why illegal and unlawful buildings should be demolished. As in the instance of the zoning example, the Building Standards Act protects land owners' interest in healthy and safe development. When an owner constructs an illegal structure two rights are in conflict, namely the individual land owner's right to build and develop and the collective interest in healthy urban development. These underlying values are, as Underkuffler puts it, of the same kind. There is generally no justification for protecting the individual's interests above the

[67] Underkuffler LS *The idea of property: its meaning and power* (2003) 98.

[68] Underkuffler LS *The idea of property: its meaning and power* (2003) 98.

[69] Underkuffler LS *The idea of property: its meaning and power* (2003) 97.

interests of other land owners in the area. Accordingly, it is necessary to demolish an illegal structure as a measure to protect the interests of the collective.

One can further argue that the owner's rights pertaining to his right to use, enjoy and exploit his property are inherently limited by legislation. Visser convincingly argues that ownership has never been an absolute right and that it has always had to conform to the prevailing needs of society.[70] Lewis in turn argues that the concept of ownership has been eroded by legislative restrictions to the point that it can no longer be described as *plena in re potestas*.[71] In a similar line of reasoning, the court in *PJ Ruck v Makana Municipality*[72] explained that legislation informs the content of the right of ownership.[73] Collectively, these sources indicate that owners must accept that their right will always be subject to the limitations imposed by legislation. An owner can only exercise his entitlements within the framework of the law.[74] The right to build an illegal structure has never formed part of his ownership entitlements and the subsequent demolition of such a structure will therefore not necessarily constitute an unjustifiable interference with property rights. What is more, section 25(1) of the Constitution recognises that it is within the state's power to regulate property rights in the public interest. Regulatory measures will be valid provided they are exercised according to the law of general application, are not arbitrary and are imposed for a legitimate public purpose. Legislation such as the Building Standards Act has an invaluable function in modern society since it regulates the quality and nature of building development. In so doing, it ensures the healthy and sustainable growth of urban areas. Limitations – including the duty to demolish illegal structures – imposed in terms of the Building Standards Act will generally be constitutionally valid on this basis. Importantly, the *FNB* methodology and specifically the substantive arbitrariness test assist the courts in determining when the regulatory interference with property rights disproportionately burdens the land owner.

[70] Visser DP 'The absoluteness of ownership: the South African common law perspective' 1985 *Acta Juridica* 39-52.

[71] Lewis C 'The modern concept of ownership of land' 1985 *Acta Juridica* 241-266.

[72] [2010] ZAECGHC 111 (24 November 2010).

[73] [2010] ZAECGHC 111 (24 November 2010) para 20.

[74] *Walele v The City of Cape Town and others* 2008 (11) BCLR 1067 (CC) para 2.

Land owners' rights are, therefore, safeguarded since overly excessive limitations on property rights will be declared invalid and unconstitutional on the basis of section 25(1) of the Constitution. [75]

Section 25(1) acknowledges that the land owner's obligations are not without boundaries. Likewise, the land owner's obligation to demolish illegal and unlawful buildings may be limited in some instances. In *Camps Bay Ratepayers and Resident's Association v Harrison* (*Camps Bay*)[76] the court relied on the *Oudekraal*[77] delay principle to find that in certain circumstances it would not set aside building plans on review. This meant that in the case under discussion the appellants (neighbouring property owners) were not able to obtain a demolition order, even though parts of the respondent's building technically contravened certain zoning provisions. This decision was justified because the applicants had delayed to enforce compliance with the zoning laws, which created the impression that 'this infraction was not their primary concern'.[78] Moreover, the respondent's contravention of the zoning law was slight and it was clear that there was no 'prospect that the infraction will impact in any meaningful way on the aesthetics or future development of Camps Bay'.[79] From the *Camps Bay* decision one can infer that there will be instances where a land owner should not be compelled to demolish an illegal or an unlawful building.

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[75] Singer JW 'The ownership society and takings of property: castles, investments and just obligations (2006) 30 *Harv Envtl L Rev* 309-338 at 329-330 argues that owners have obligations as well as rights. The takings clause requires of the courts to determine whether the limitation imposed on an owner amounts to a just obligation. Singer essentially argues that ownership is an inherently limited right, but adds that the obligations imposed on the owner may not be disproportionate.

[76] (560/08) [2010] ZASCA 3 (17 February 2010).

[77] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) at 249H-I and 242E it was confirmed that in proceedings for judicial review, the court has the discretion to order the setting aside of administrative action. Typically, in exercising its discretion the court will consider the length of time that has lapsed since the administrative action has first taken place, the need for finality and the consequences 'for the public at large, and, indeed for future generations, of allowing the invalid decision to stand'.

[78] [2010] ZASCA 3 (17 February 2010) para 55.

[79] [2010] ZASCA 3 (17 February 2010) para 62.

Several considerations could induce the court to refuse to order demolition of illegal building works. One such a circumstance would be where the building is illegal because it conflicts with conditions of title, which have been rendered obsolete as a result of changed circumstances in the neighbourhood. A land owner cannot be compelled to demolish a building that has been built in contravention of a condition of title when, for instance, the character of the neighbourhood has already changed to such an extent that the condition is rendered meaningless.[80] Under these circumstances, it cannot be said that the owner caused his community harm by using his property in a prohibited manner. It would also be unreasonable to require an owner to demolish a building if its existence causes negligible or no harm to the community and the extent to which it contravenes the law is very small. Likewise, an owner should not be compelled to demolish his building where, as in *Camps Bay*, the community took an unreasonably long time to vindicate their rights in court or where rights of the objectors are not affected significantly by the illegality, while demolition would have excessively unfair implications for the owner. Singer explains that obligations are not necessary justified just because they are demanded by society.[81] Section 25(1), and specifically the *FNB*[82] substantive arbitrariness test, also directs the court to establish when the demands of society (the demolition or partial demolition of illegal structure) amount to an unconstitutional deprivation of property rights, prescribing a nuanced text that allows for a complex weighing up of all the relevant factors in their context.

6 3 2 Alternative perspective: restrictive covenants

Law and economics scholars adopt an alternative approach in relation to the enforcement of restrictive covenants. Restrictive covenants are in their view essentially contracts, concluded between land owners in a neighbourhood, designed to place

[80] Van Wyk J 'Removing restrictive conditions and preserving the residential character of a neighbourhood' (1992) 55 *THRHR* 369-385 at 371.

[81] Singer JW 'The ownership society and takings of property: castles, investments and just obligations (2006) 30 *Harv Envtl L Rev* 309-338 at 329-330.

[82] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

limitations on a person's use of his land.[83] These contracts are registered against the title deeds of the properties to ensure that subsequent land owners are bound by the covenant.[84] The restrictive covenants described by law and economics theorists are similar to the restrictive covenants adopted in South African law from English law.[85]

Posner explains that restrictive covenants have two shortcomings as planning tools. Firstly, they are inflexible in instances where the character of the neighbourhood has changed. Secondly, they are only applicable in an initial single-ownership setting.[86] He argues that the problem of obsolete restrictive covenants will not be as serious if the courts are willing to grant damages for the breach of those restrictive covenants, instead of an interdict (demolition).[87] Posner believes that a damages order is superior to an interdict (demolition) because it will not prevent the breach of the covenant that 'increased the value of the defendant's property by more than it diminished the value of the other properties in the tract, since by hypothesis, his liability would be smaller than

[83] Ellickson has recommended consensual systems of land-use regulation as an alternative to government regulation. More specifically, he argues that restrictive covenants and nuisance rules are a more effective way to solve land-use conflicts than state regulation. See in this regard Ellickson RC 'Alternative to zoning: covenants, nuisance rules, and fines as land use controls' (1973) 40 *U Chi L Rev* 681-781.

[84] Posner RA *Economic analysis of law* 6 ed (2003) 64.

[85] Van Wyk J 'The nature and classification of restrictive covenants and conditions of title' (1992) 25 *De Jure* 270-288 at 271 explains that restrictive covenants were received in South African law from English law during the nineteenth century. The term 'covenant' refers to an agreement or contract in terms of which limitations are placed on a land owner's use of the land. Restrictive covenants, in the South African sense, are constructed as contracts for the benefit of a third party (*stipulatio alteri*). This construction makes the contract binding and beneficial to all owners in the township. For more information on the *stipulatio alteri,* refer to Van Wyk AMA *Restrictive conditions as urban land-use planning instruments* unpublished LLD thesis Unisa (1990) 85-93.

[86] Posner RA *Economic analysis of law* 6 ed (2003) 64-65. The restrictive covenant referred to by Posner is created by the original township developer, who registers the restrictive covenant against the title deeds of all the properties. Posner argues that restrictive covenants can only be applicable in initial single-ownership settings because the original developer (who owns the entire plot of land) has to create the restrictive covenants before he sells the plots.

[87] Posner RA *Economic analysis of law* 6 ed (2003) 65.

his gain from the breach'.[88] In instances where an injunction (demolition) is granted, the violator will have to negotiate with every other land owner to allow the breach of the covenant. In some instances, the violating land owner might have to pay excessive amounts to those property owners who are holding out for a better price and this in turn may lead to the transaction never being completed.[89] Explained differently, an interdict for the breach of a restrictive covenant increases transaction costs, which can prevent a land owner from obtaining a use of his property that he values more than the other land owners in the neighbourhood.

Posner's approach is based on Calabresi and Melamed's distinction between property rules and liability rules as methods for protecting property rights.[90] A property rule refers to the situation where a property owner can only be deprived of his property right with his consent.[91] This means that when it comes to restrictive covenants, land owners have a right to enforce their rights under the covenant by way of a demolition order. They can only be deprived of the demolition order if they consent to such a deprivation. A liability rule implies that a person can be deprived of property rights without his consent and at a price determined by the court.[92] The expropriation of property serves as an apt example of when property rights are vindicated by a liability rule.[93]

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[88] Posner RA *Economic analysis of law* 6 ed (2003) 66.

[89] Posner RA *Economic analysis of law* 6 ed (2003) 66.

[90] The concept of property rules and liability rules was coined by Calabresi G and Melamed AD in their seminal article 'Property rules, liability rules and inalienability: one view of the cathedral' (1972) 85 *Harv L Rev* 1089-1128.

[91] This chapter draws from Miceli's explanation of property rules and liability rules: Miceli JT 'Property' in Backhaus JG (ed) *The Elgar companion to law and economics* 2 ed (2005) 246-260 at 249. Where necessary reference is made to Calabresi G and Melamed AD 'Property rules, liability rules and inalienability: one view of the cathedral' (1972) 85 *Harv L Rev* 1089-1128.

[92] Miceli JT 'Property' in Backhaus JG (ed) *The Elgar companion to law and economics* 2 ed (2005) 246-260 at 249.

[93] Calabresi G and Melamed AD 'Property rules, liability rules and inalienability: one view of the cathedral' (1972) 85 *Harv L Rev* 1089-1128 at 1106-1108.

Calabresi and Melamed argue that when transaction costs are low, it would be economically efficient to vindicate property rights by way of a property rule. Conversely, when transaction costs are high, it would be more efficient to vindicate property rights by way of a liability rule.[94] The reason for this is that when transaction costs are low property owners would be able to negotiate a beneficial arrangement.[95] In circumstances where an owner has built in contravention of a restrictive covenant, Calabresi and Melamed would argue that a demolition order should be granted where there are only a few owners who have the right to enforce compliance with the covenant. If a property owner believes that his non-compliant use of his property is more valuable than the other property owners' right to enforce the covenant, he will attempt to negotiate an agreement. Since there are only a few property owners, which reduces the possibilities of hold-outs, there is a real possibility that a mutually beneficial agreement can be reached. For example, the property owners might agree to sell their right to enforce the demolition order (in other words, accept payment for not using it). However, when the restrictive covenant is registered against the title deeds of an entire

[94] Miceli JT 'Property' in Backhaus JG (ed) *The Elgar companion to law and economics* 2 ed (2005) 246-260 at 249.

[95] Calabresi G and Melamed AD 'Property rules, liability rules and inalienability: one view of the cathedral' (1972) 85 *Harv L Rev* 1089-1128 at 1106-1108 at 1115-1118; Miceli JT 'Property' in Backhaus JG (ed) *The Elgar companion to law and economics* 2 ed (2005) 246-260 at 249. Calabresi and Melamed identified four rules that they apply with reference to the problem of pollution. In terms of this problem, person A pollutes and person B dislikes the pollution. A court could apply any one of the four rules to solve the problem of competing interests. Rule one provides that B can prevent A from polluting by way of an interdict. This is a property rule in favour of B. Rule two provides that A can pollute, but only if he pays damages to B. This is a liability rule in favour of B. Rule three provides that A can pollute and that B must buy the pollution right from A if he wants to prevent it. This rule is a property rule in favour A. Finally, rule four provides that B can prevent A from polluting, provided that he pays A an amount of damages determined by the court. If transaction costs are low the court can apply either rule one or three to protect property rights. The reason for this is that if rule one is applied, A (if he considers his right sufficiently valuable) can approach B to buy the right to pollute. Similarly, if rule three is applied, B (if he considers clean air sufficiently valuable) can approach A to negotiate an agreement where A will stop polluting. Accordingly, if transaction costs are low the granting of an interdict will result in the most economically efficient outcome.

neighbourhood, transaction costs increase dramatically. The owner would then have to obtain the consent of every other owner in the township to prevent his building from being demolished.[96] In such circumstances, the property owner might not be able to conclude an agreement with the other property owners, even though such an agreement would be desirable.[97] This analysis means, by way of summary, that a land owner, who wants to building in conflict with a restrictive covenant, may either be forced to negotiate a satisfactory solution with a small group of affected land owners (failing which they can enforce the covenant) or be allowed to proceed with building operations in conflict with the covenant, subject to a compensation payment to a large number of affected land owners (who would then be precluded from enforcing the covenant).

Law and economics analysis can in some instances be contradictory. Hansford[98] argues that denial of a demolition order for breach of a restrictive covenant will, from an economic perspective, not necessarily yield the best results. Hansford relies on the decision in *Prime Bank, Federal Savings Bank v Galler*[99] (*Prime Bank*) to illustrate his point. In *Prime Bank* the court refused to order the demolition of a building built in conflict with a restrictive covenant. In so doing, the court enabled the parties to bargain for the value that should be attributed to the restrictive covenant. Hansford explains that one can presume that the plaintiff would be willing to allow the house to stand in its

[96] Calabresi G and Melamed AD 'Property rules, liability rules and inalienability: one view of the cathedral' (1972) 85 *Harv L Rev* 1089-1128 at 1119.

[97] Calabresi G and Melamed AD 'Property rules, liability rules and inalienability: one view of the cathedral' (1972) 85 *Harv L Rev* 1089-1128 at 1106 and 1119 explain, with reference to the pollution example, that if person A had to negotiate with many persons to obtain his right to pollute, it is likely that an agreement will never be reached as a result of high transaction costs. In such circumstances, it is best to impose a liability rule. Miceli JT 'Property' in Backhaus JG (ed) *The Elgar companion to law and economics* 2 ed (2005) 246-260 at 249 explains that the choice in favour of a liability rule when transaction costs are high is not unqualified because the court does not know what the subjective value of the property right is. There is a possibility that the court can undervalue the property right, which means an incorrect damages sum might be awarded. Miceli further explains at 249 that 'the cost of potentially inefficient exchanges under liability rules needs to be weighed against the cost of forgone transactions under property rules'.

[98] Hansford DW 'Injunctive remedy for breach of restrictive covenants: an economic analysis' (1993) 45 *Mercer L Rev* 543-556.

[99] 263 Ga 286, 430 SE 2d 735 (1993).

position, without alterations, for a certain price. Likewise, the bank would be willing to modify the house to a certain extent. This situation can lead to a bilateral monopoly, which in turn creates higher transaction costs.[100] Transaction costs will be higher because the parties will bargain over the price. Bilateral monopolies result in negative social costs because as parties bargain to extract the most profit, possible social waste occurs. Social waste refers to the situation where parties incur high transaction costs to conclude an agreement in terms of which the covenant will not be enforced or where they could not reach an agreement to relax the covenant. The author argues that the ability to rely on a restrictive covenant to protect your property right is worth far more that a court's attempt to prevent the demolition of a structure in individual cases. The court's refusal to enforce restrictive covenants by way of an interdict will result in social waste because transaction costs are higher.[101]

Law and economics analysis therefore does not provide a conclusive answer to the question whether it is preferable to enforce restrictive covenants by way of a liability rule (compensation) rather than a property rule (demolition). It should be emphasised that this analysis preferably operates in a private-law setting and restricts the state's regulation of property to instances where high transaction costs makes state intervention inevitable, in which case law and economics theory does consider it necessary to rely on a public remedy to protect property rights.[102] Miceli reasons that a public remedy should be employed to protect property rights in circumstances where an individual owner acts in a manner that negatively impacts on a large group of people.[103] The negative impact on an individual owner might not be enough to prompt that owner to take action against the wrongdoer. However, the aggregate harm will outweigh the benefit that the wrongdoer obtains from his action. In such instances, the government

[100] Hansford DW 'Injunctive remedy for breach of restrictive covenants: an economic analysis' (1993) 45 *Mercer L Rev* 543-556 at 554-555.

[101] Hansford DW 'Injunctive remedy for breach of restrictive covenants: an economic analysis' (1993) 45 *Mercer L Rev* 543-556 at 554-555.

[102] Miceli JT 'Property' in Backhaus JG (ed) *The Elgar companion to law and economics* 2 ed (2005) 246-260 at 250.

[103] Miceli JT 'Property' in Backhaus JG (ed) *The Elgar companion to law and economics* 2 ed (2005) 246-260 at 250.

acts as an agent of the victims by regulating the outcome of the offending action. Government regulation of property rights is justified if transaction costs among victims are high, which precludes a private remedy.[104]

One can argue that the construction of an illegal building will cause harm to, for example, all the land owners in the township. The potential aggregate harm caused by illegal building therefore justifies the enactment of regulatory laws such as the Building Standards Act. This Act protects the rights of others by firstly, imposing fines on land owners who are in the process of constructing illegal buildings[105] and secondly, by prescribing the demolition of offending buildings. Law and economics theory therefore supports the regulation of building and development in the public interest. The protection mechanisms incorporated into regulatory laws include property rules (demolition) and liability rules (fines) or even both. Explained differently, there may be instances where the regulatory law protects property rights by requiring the demolition of illegal and unlawful structures. Likewise, there may also be instances where the regulatory law protects property rights by way of a liability rule. It is therefore too inflexible to argue that regulatory laws will always protect property rights by ordering the demolition of unlawful and illegal structures. Nevertheless, one can argue that for policy reasons it might be beneficial to protect property rights by demolishing unlawful and illegal buildings (a property rule) rather than compensation (liability rule) in the majority of cases. As explained above, demolition – as opposed to compensation – effectively protects the rights of all the land owners in the area. Demolition also restores the unique character of the neighbourhood and it removes the unlawful and illegal use of land, which means that it could serve the public interest in ways that surpass the mere aggregate of individual interests. Moreover, compared to compensation, demolition arguably has more deterrent value.

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[104] Miceli JT 'Property' in Backhaus JG (ed) *The Elgar companion to law and economics* 2 ed (2005) 246-260 at 250.

[105] See in this regard section 4 (4) of the National Building Standards and Building Regulations Act 103 of 1977.

6 3 3 Conclusion

A land owner has more obligations and responsibilities than the owner of, for example, a bicycle. The very nature of the object indicates that the land owner's rights in relation to his property will necessarily be more limited. Doctrinal literature confirms that ownership has never been an absolute right and that it has to accommodate the prevailing needs of society. This is also reflected in section 25(1) of the Constitution insofar as it implicitly recognises that the state has the power to regulate property rights in the public interest. Land owners should accordingly expect that their rights will be limited by legislation such as zoning laws, town-planning ordinances, building and development controls and health and safety statutes. Typically, demolition is one of the ways in which these laws are enforced, as is evidenced by section 21 of Building Standards Act. Land owners should therefore be aware of the fact that they face the possibility of a demolition order in instances where their illegal buildings cannot be altered to comply with the relevant law and when it is found that compensation does not adequately protect the interests affected by the illegal use of land.

There are in any event compelling arguments favouring the demolition of buildings that are irremediably unlawful or illegal. The demolition of an illegal structure (property rule) protects the rights of all the owners in a residential area, while a compensation award (a liability rule) is likely to benefit adjacent neighbouring land owners only. The argument in favour of demolition is even stronger if the harm caused by the illegal or unlawful use of land cannot be rectified by compensation or if the aggregate harm caused to the community as a whole cannot be translated into or reflected adequately in monetary terms. Demolition is also an appealing solution when buildings have been constructed in conflict with conditions of title or restrictive covenants. These restrictive conditions are only registered against the servient tenements and it is accordingly problematic to establish which erven are dominant tenements. By implication, it will be problematic to establish which land owners should receive compensation when a neighbour has constructed an unlawful building in conflict with such a condition.

The social obligation theory requires the owner to contribute to the social structures that have enabled him to flourish. An owner is also obliged to refrain from

causing his community harm when he uses, enjoys and exploits his property. Illegal structures have the potential to change the character of neighbourhoods and they may pose a threat to the health and safety of the community. Evidently, illegal structures create urban environments that are not conducive to human flourishing. On this point it can be expected of the land owner to compensate those members of his community negatively affected by his illegal use of land if legislation provides for such a remedy. However, the land owner owes it to his community to demolish illegal structures if compensation is not a viable option and if the buildings cannot be brought in line with the law. The owner is in this sense morally compelled to remove the harm that he has caused to his community, if necessary by demolishing the illegal building.

There are, however, circumstances where it would be unjust and unreasonable to compel the owner to completely or partially demolish an illegal structure because it will result in an excessive interference with the land owner's other legitimate property interests in the legal parts of the building, while demolition would not enhance the social interest significantly or at all. This is illustrated by the *Camps Bay* decision, where demolition would have disproportionately burdened the owner, without making much difference to the interests of neighbours or of the community. Factors that support this decision in the case were that the neighbouring land owners and the local authority had failed for a long time to challenge the respondent's infraction of the zoning scheme and, further, that the illegal aspects of the building would not have impacted on the character of the area or have affected the rights of others significantly. It was clear that the demolition of the building would have served no real purpose. Moreover, it would have been prohibitively expensive for the land owner to bring her building in line with the zoning scheme, and the infraction was caused by an error of which the owner was unaware. The complete or partial demolition of the Camps Bay building in these circumstances would have fallen foul of section 25(1) on the ground of substantive arbitrariness.

In conclusion, land owners normally have an obligation to develop their property within the confines of the law. The owner is responsible to demolish illegal structures, partially or wholly, whenever their negative impact on neighbours or the public cannot

be rectified adequately by a compensation order. This obligation is not unlimited and in exceptional circumstances owners cannot be compelled to demolish their illegal or partially illegal structures. There is no clear indication when such a circumstance would arise and each case has to be assessed according to its unique set of facts. The *FNB* substantive arbitrariness test indicates when the demolition of an illegal structure might disproportionately burden the owner. In particular, the *FNB* substantive arbitrariness test directs the court to consider the complexity of relationships involved in the dispute to ensure that there is sufficient reason for the demolition of the unlawful or illegal building. This means that the court will not sanction the demolition of an illegal building if it will amount to a substantively arbitrary deprivation of the land owner's legitimate property interests. Likewise, the court will not order the demolition of the illegal structure if it finds that the authorising law is procedurally unfair. One can conclude that section 25(1), as interpreted and applied in *FNB*, delineates the extent of the land owner's obligation to demolish illegal and unlawful buildings. This obligation is specifically limited to instances where demolition will not result in the unconstitutional deprivation of the land owner's other legal property interests. More specifically, the *FNB* substantive arbitrariness test requires of the court to consider the complexity of the relationships involved in the dispute and to balance the interests of the affected land owner, the neighbours and the public. Chapter 5 showed, with reference to the *Camps Bay* decision, that demolition amounts to an arbitrary deprivation of property if the result is that the land owner is deprived of most, if not all, of her legitimate property interests in a structure while the neighbouring land owners and the public in general derives no benefit from the demolition of the illegal structure or building works. In the *Camps Bay* example, the *FNB* analysis showed that there was a disproportionate relationship between the purpose of the deprivation (public health and safety and the protection of neighbouring land owners' interests) and the deprivation in question, namely demolition of illegal building works. This meant that there would have been insufficient reason for the deprivation (demolition).

6 4 Reasons for preserving historic buildings

6 4 1 Social obligation of the owner

Chapter 4 described the extensive limitations that historic preservation laws[106] can place on ownership. Alexander argues that the limitations created by historic preservation laws are best explained with reference to the social-obligation norm. He further argues that when it comes to limitations that are placed on ownership by legislation, one should ask: what obligations does a land owner owe to his community in relation to the use, condition and care of his property?[107] Alexander reasons that the social-obligation theory recognises that humans can only operate as free and rational agents within a specific type of culture. Accordingly, a person owes it to his community to support the 'institutions and infrastructure that are part of the foundation of that culture'.[108] This means that the individual might sometimes be required to sacrifice personal preference-maximising uses of his land.[109] An example of such a sacrifice is where the owner is compelled to protect a historic building even though this prevents him from putting the land to a more profitable use.[110] A property owner's obligation in relation to a building includes not only the duty to ensure that it is a healthy and safe structure, but also the duty to preserve aesthetic qualities that are valued by the community.[111]

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[106] For an historic account of the development of the notion that it is the broader public's responsibility to protect cultural property refer to Sax JL 'Heritage preservation as a public duty: the Abbe Gregoire and the origins of an idea' (1990) 88 *Mich L Rev* 1142-1169.

[107] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 794.

[108] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 795.

[109] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 795.

[110] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 795. Alexander relies on *Penn Central Transportation Company v the City of New York* 438 US 104 (1978) (*Penn Central*) in support of his argument.

[111] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 795.

Alexander reasons that a building is 'obviously special' or 'nearly unique' if it has been designated as a landmark or where an application for a demolition permit for the historic building has been turned down.[112] In such circumstances, the owner has a responsibility towards the community to not permanently destroy an exceptional building. Alexander concedes that not all aspects of the community's infrastructure are necessary 'to maintain the kind of culture that enables development of those qualities without which no individual can experience meaningful freedom or practice personal responsibility.'[113] However, some buildings are indispensable because they form part of the civic culture of specific communities.[114] Unique historic buildings play a vital role in forming an urban community's identity as well as the identity of its inhabitants.[115] Accordingly, a property owner has the duty to protect the buildings that are deemed to be part of his community's civic culture. Where a local authority decides to protect a building from destruction or alteration, this obligation may require the owner to protect that building without any form of compensation. After all, compensation should not be paid to an owner to prevent him from causing harm to his community, if the right to cause harm never formed part of his entitlements.[116]

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[112] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 795.

[113] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 795. Underkuffler LS *The idea of property: its meaning and power* (2003) 110 explains that cultural property (which includes artefacts and historic buildings) is a legal recognition of the interests that certain groups have in specific tangible or intangible things. These interests should be protected even if it conflicts with the bundle of rights that property owners usually enjoy.

[114] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 795. In this regard, Alexander argues that the Grand Central Terminal (the historic building relevant in *Penn Central*) plays an indispensable role in the community of New York.

[115] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 795 further explains that historic landmarks build a collective urban memory and that destruction of a valuable building will erase such a memory. Erasure of collective urban memory 'destabilizes a society and its cultures, with potentially severe political consequences'.

[116] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 796.

In effect, Alexander argues that property owners have a social obligation to maintain unique or historic buildings because they form part of the community's culture and heritage. Property owners should not be compensated for preserving historic buildings because the owner never had the right to cause harm to his community by the destruction of historic buildings.[117] Property owners should be aware of the fact that ownership of an historic building is accompanied by the social obligation to preserve that building for the benefit of the community.

However, Alexander qualifies this argument by suggesting that it may be beneficial to incorporate German equalisation-style measures into US law.[118] These measures will cater for instances where 'there are good reasons to hold that that the regulation is not a taking but where unfairness exists because the regulation disproportionately burdens one or a small number of owners'.[119] Alexander reasons that equalisation measures in the US context are not necessarily limited to compensatory awards. He explains his argument with reference to *Penn Central Transportation Company v City of New York* (*Penn Central*),[120] where the land owner was in possession of valuable transferable development rights because of its building's landmark status. Alexander is of the view that the transferable development rights to some extent mitigated the burden brought about by historic preservation. These transferable development rights therefore had the

[117] This view is supported by Nivala J 'The future for our past: preserving landmark preservation' (1996) 5 *NYU Environmental Law Journal* 83-119 at 110 and 117. Nivala reasons that the destruction of a landmark or historic building is detrimental to the public because it causes physical, financial and psychological harm to the community. When a government acts to protect landmarks and historic buildings it is not to ensure reciprocity of advantage for neighbouring property owners. Rather, historic preservation is designed to prevent the community from being harmed and further to preserve the buildings for future generations. As a result, the owner can be required to protect and maintain the building without compensation. Nivala further explains that landmark and historic preservation safeguards the qualities of a civilised community. The only reciprocal advantage to which the owner is entitled to is the right to live within the confines of the civilised community.

[118] Alexander GS *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 236.

[119] Alexander GS The global debate over constitutional property: lessons for American takings jurisprudence (2006) 236.

[120] 438 US 104 (1978). See the discussion of this case in chapter 4, section 4 3 3.

function of an equalisation measure. It seems as if Alexander suggests that there may be instances where it is necessary to assuage the otherwise excessive burden that is imposed on a land owner by regulatory laws such as historic preservation statutes.[121]

With reference to her model (tier one and tier two) described in section 6 3 1 above,[122] Underkuffler argues that it can be expected of land owners to preserve historic structures in the public interest.[123] Underkuffler's argument extends to buildings situated in historic districts as well as to individual landmarks. Historic districts are comparable to zoning schemes and it is relatively easy to see why the individual land owner's right to alter or demolish his historic structure should not trump the public interest in historic preservation in this instance. When a land owner challenges a historic district ordinance, he essentially asserts his right to use and control his building. The land owner also seeks to protect both his investment in the land and expectations that he may have in relation to the property.[124] Historic district ordinances protect similar values held by the collective. More specifically, historic district ordinances protect the investments and expectations of all land owners in the area. The core values that underlie these competing claims are, therefore, the same in kind. Accordingly, there is no basis for protecting the individual's rights in relation to his structure over and above the public interest. Explained differently, the individual land owner does not have presumptive power over the interests of other members of his community.[125]

When the community requires the protection of an individual historic landmark, their claim is rooted in 'intellectual or emotional or psychological interests, rather than economic ones'.[126] Underkuffler argues that the core values that underlie the individual land owner's and the community's claims are, nevertheless, similar in kind. The land owner, for example, values his right to control his property. He also has a desire to

[121] Alexander GS The global debate over constitutional property: lessons for American takings jurisprudence (2006) 236- 239.

[122] See in this regard section 6 3 1.

[123] Underkuffler LS *The idea of property: its meaning and power* (2003) 110-116.

[124] Underkuffler LS *The idea of property: its meaning and power* (2003) 114.

[125] Underkuffler LS *The idea of property: its meaning and power* (2003) 114.

[126] Underkuffler LS *The idea of property: its meaning and power* (2003) 115.

protect his investment in the land and the expectations that he may have in relation to the building.[127] Likewise, the community values its right to control a building to which it attaches cultural and historic relevance. In this regard, Underkuffler explains that '[t]he state of affairs that the public interest asserts is, thus, of a kind that we readily associate with property rights'.[128] Furthermore, humans want to protect cultural property because it is critical to their attempt to 'construct cultures, preserve memories, inspire wonder, embody aspirations, and ultimately understand – in some way – the place of individuals in the human and natural world.'[129] Underkuffler reasons that these considerations have for a long time been associated with property rights and claims. Therefore, there is no basis for protecting the rights of the individual to demolish the structure over the interest of the public in historic preservation.[130]

Some authors recognise the importance of historic preservation but are of the view that some land owners should not be singled out to bear the cost of preserving historic landmarks and buildings. Fischel argues that it is not necessary to compensate an owner for the limitations placed on his ownership by historic preservation legislation if his building forms part of an entire neighbourhood that is designated as a historic area, or where a number of buildings are subject to heritage preservation laws. The reason for this is that the benefits obtained by the owner from the designation of the neighbourhood or the protection of other buildings in the area are roughly the same as the limitations that are placed on his rights by historic preservation laws.[131] However, it is unfair in his view to expect of the single owner to carry the cost of preservation in circumstances where he owns an isolated landmark that is not situated within a historic district or in the vicinity of other protected buildings.[132] The owner provides a public

[127] Underkuffler LS *The idea of property: its meaning and power* (2003) 115.

[128] Underkuffler LS *The idea of property: its meaning and power* (2003) 116.

[129] Underkuffler LS *The idea of property: its meaning and power* (2003) 116.

[130] Underkuffler LS *The idea of property: its meaning and power* (2003) 116.

[131] Fischel WA 'Lead us not into Penn Station: takings, historic preservation, and rent control' (1994) 6 *Fordham Envtl LJ* 749-754 at 753.

[132] Fischel WA 'Lead us not into Penn Station: takings, historic preservation, and rent control' (1994-1995) 6 *Fordham Envtl LJ* 749-754 at 753 and to the same effect Fischel WA *Regulatory takings: law, economics and politics* (1995) 51.

benefit by protecting and maintaining the historic building. Fischel argues that this position is unfair and that the owner should at least be provided with some form of reciprocal benefit.[133] This benefit does not necessarily have to be monetary compensation. An alternative for monetary compensation would be the transferable development rights possessed by the owners in *Penn Central.*[134]

Rose is also of the view that the protection of an individual landmark or historic building raises some equity issues because that building is singled out for 'special treatment'.[135] More specifically, she argues that historic preservation laws place severe limitations on a property owner's rights in relation to his building. These restrictions can result in a diminished property value, with the concomitant implication that the owner pays for the community's 'preservation preferences'.[136] In *Penn Central* it was decided that historic preservation laws do not bring about a taking of private property for which the owner should be compensated.[137] Nevertheless, it is still necessary to provide some form of consent or compensation scheme to property owners, developers and builders 'to whose creative endeavours the community must look for future contributions to the

[133] Fischel WA 'Lead us not into Penn Station: takings, historic preservation, and rent control' (1994) 6 *Fordham Envtl LJ* 749-754 at 753 and to the same effect, Fischel WA *Regulatory takings: law, economics and politics* (1995) 51. For an economic perspective of heritage preservation, refer to Gold A 'The welfare economics of historic preservation' (1975) 8 *Conn L Rev* 348-369 at 368-369. Gold argues that there is no economic justification for piling all the costs of preservation on the single owner and that there should rather be a form of cost sharing. The author suggests that the property owner should be compensated for the limitations placed on his rights in relation to the historic building.

[134] Fischel WA 'Lead us not into Penn Station: takings, historic preservation, and rent control' (1994) 6 *Fordham Envtl LJ* 749-754 at 753 with reference to *Penn Central Transportation Company v the City of New York* 438 US 104 (1978).

[135] Rose CM 'Preservation and community: new directions in the law of historic preservation' (1980) 33 *Stan L Rev* 473-534 at 497.

[136] Rose CM 'Preservation and community: new directions in the law of historic preservation' (1980) 33 *Stan L Rev* 473-534 at 497.

[137] Rose CM 'Preservation and community: new directions in the law of historic preservation' (1980) 33 *Stan L Rev* 473-534 at 502, with reference to *Penn Central Transportation Company v the City of New York* 438 US 104 (1978).

urban environment'.[138] Rose further suggests that it might be better for 'a community-conscious preservation ordinance' to rather delay alterations to a protected building, instead of an outright ban on demolition or alteration.[139] She supports this proposition by explaining that a delay in the demolition will place the owner in a 'weaker moral position from which to complain of caprice or special burden'.[140] Moreover, delay will enable the parties involved to educate each other in relation to the stakes involved. Delay will also allow the parties to reach a compromise and it will make historic preservation a function of community pressure and education.[141]

Finally, to summarise, Alexander is of the view that the owner generally has the obligation to maintain aspects of his community's civic culture, which includes historic buildings, without the payment of compensation. He argues that the right to demolish an historic landmark was never a right that the owner actually had in relation to his building. However, there may be instances where it would be necessary to mitigate the otherwise excessive burden caused by historic preservation by way of an equalisation-style measure. Other authors argue that land owners should generally not be compelled to bear the burden of historic preservation without some form of reward. The reward does not have to be monetary compensation and it can be something else such as transferable development rights.

6 4 2 Conclusion

In South Africa the state has the power to regulate property rights in the public interest without the payment of compensation. Case law has confirmed that ownership entitlements can only 'be exercised in accordance with the social function of the law and

[138] Rose CM 'Preservation and community: new directions in the law of historic preservation' (1980) 33 *Stan L Rev* 473-534 at 502.

[139] Rose CM 'Preservation and community: new directions in the law of historic preservation' (1980) 33 *Stan L Rev* 473-534 at 503.

[140] Rose CM 'Preservation and community: new directions in the law of historic preservation' (1980) 33 *Stan L Rev* 473-534 at 503.

[141] Rose CM 'Preservation and community: new directions in the law of historic preservation' (1980) 33 *Stan L Rev* 473-534 at 504.

the interests of the community'.[142] Furthermore, 'inherent responsibilities of ownership towards the community in the exercise of entitlements have been increasingly emphasised'.[143] The National Heritage Resources Act of 25 of 1999 (the Heritage Resources Act) forms part of the framework within which ownership should function.[144] One can conclude, in line with Alexander's social obligation theory, that the ownership of land in South Africa is accompanied by the obligation to preserve culturally or historically valuable buildings situated on the property. 'Preserve' means that the owner must refrain from demolishing or altering the building unless he has obtained the requisite consent. It can also mean that the owner should maintain the historic building to a prescribed standard.

That being said, this obligation is not unlimited. Chapter five, section 5 3 2, describes the circumstances where denial of the demolition permit for an historic building will amount to a substantively arbitrary deprivation of property. The chapter concluded that it would be unconstitutional to deny the demolition permit where the owner has, in effect, been deprived of all economic use of the property and where he has been saddled with the duty to maintain the building at his own expense. This would be the case when the owner cannot use the property for any reasonable purpose and is also required to bear the financial responsibility of maintaining the building. The Heritage Resources Act, and by implication the community, imposes a disproportionate burden on the owner in these circumstances. Explained differently, a land owner carries a disproportionate burden in the public interest when, in addition to imposing the duty to maintain the historic property at his own expense, the historic preservation statute causes the owner to lose all economically viable use of the property, including the possibility of selling, leasing or using the property in any other way. Chapter 5 argues that the disproportionate burden on the land owner can be mitigated by an equalisation measure, an example of which has indeed been incorporated in the Heritage Resources Act. Viewed from this perspective, one can argue that the owner's rights can be protected by a liability rule in the instance where the Heritage Resources Act imposes a

[142] *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) 37.

[143] *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) 37.

[144] *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) 37.

disproportionate burden, but where the preservation of the structure is nevertheless still desirable. Importantly, equalisation includes but is not limited to compensatory awards. Chapter 5, section 5 3 2 explains that 'equalisation' can also refer to subsidies, tax breaks, consent use of property in conflict with the zoning scheme and, in the US context, transferable development rights. The liability rule can therefore take on different forms – it is not necessarily limited to monetary compensation. However, chapter 4, sections 4 5 2 and 4 5 3 argue that there may be instances where the right to demolish an historic structure (a property rule) cannot be replaced by a liability rule. This will typically be the case where the authorising law does not provide for a liability-rule like remedy to protect property rights. In such instances it would be necessary to allow the demolition of the structure if the preservation of a building would result in an excessive and unconstitutional interference with property rights.

6 5 Reasons for limiting a property owner's right to demolish an unlawfully occupied building

6 5 1 Introduction

In chapters two and five it was shown that the courts will not always order the immediate eviction of unlawful occupiers from inner-city buildings to enable the owners to proceed with the demolition of those buildings and the subsequent development of the property. This section aims to explore the reasons for placing a temporary or even permanent ban on a land owner's right to demolish an unlawfully occupied building for the sake of protecting the affected occupiers' access to housing rights. The point of departure will be the 'defined and carefully calibrated constitutional matrix' described by Sachs J in the famous decision of *Port Elizabeth Municipality*.[145] This matrix consists of two main elements, namely the historic context of evictions, forced removals and demolitions during apartheid and the constitutional and statutory reform dimension, of which section 25, section 26 and legislation promulgated to give effect to them form

[145] 2004 (12) BCLR 1268 (CC) para 14.

part.[146] A corollary of the operation of section 25 within the framework of the matrix is the social responsibilities that accompany the ownership of especially land in the constitutional era.

Alexander's theory can be applied to explain the land owner's constitutional obligations embodied in section 26(3) of the Constitution. As explained in section 6 2 above, the social obligation theory provides that the land owner, as a member of a community, has a duty to provide those things that are necessary to enable his community to flourish. The focus of this discussion falls on the social obligations that the land owner has as a member of an urban community. More specifically, it is argued that in some circumstances the owner has a duty to temporarily tolerate the continued presence of unlawful occupiers on his land even if it interferes with his demolition and development plans. The section below briefly refers to the constitutional matrix developed in *Port Elizabeth Municipality* and expands on the notion that the owner has certain obligations in relation to his building. The third section refers to Radin's[147] distinction between fungible and personal property since it provides a useful tool for explaining why the rights of the unlawful occupiers place limitations on the owner's rights to demolish his building in specific circumstances.

6 5 2 The constitutional matrix developed in Port Elizabeth Municipality

As explained above, the constitutional matrix described in *Port Elizabeth Municipality* consists of two main elements, that is, the historical context and the constitutional and statutory dimension, of which section 25 and section 26 form part. The court first sketched the historical context that led to the inclusion of section 26(3) in the Constitution. In so doing, the court stressed the political nature of evictions and

[146] The historic and constitutional context described by the court has far-reaching implications for the relationship between section 25 and section 26 of the Constitution. In *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) paras 19-23, the court provides an intricate explanation of exactly how the matrix affects the relationship between these two constitutional provisions. This aspect of the judgment is discussed in chapter five.

[147] Radin MJ 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015.

demolitions and explained that many poor South Africans today are homeless as a result of the apartheid government's abuse of the demolition and eviction powers that were created by apartheid legislation. Legislation such as the Prevention of Illegal Squatting Act 52 of 1951 (PISA) enabled 'grave assaults on the dignity of black people'[148] and facilitated the 'creation of large, well-established and affluent white urban areas co-existing side by side with crammed pockets of impoverished and insecure black ones'.[149] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was enacted to give effect to the values embodied in section 26(3) of the Constitution, namely to rectify the injustices of the past and to regulate the manner in which future evictions will take place.[150] The court explained that PIE is not only a mechanism to restore common law property rights by freeing them from the racist and authoritarian effects of apartheid.[151] PIE should not be viewed as a mechanism solely designed to promote 'judicial philanthropy in favour of the poor [either], though compassion is built into its very structure'.[152] Rather, PIE should be understood and interpreted 'within a defined and carefully calibrated constitutional matrix'.

In determining the scope of constitutionally protected rights, such as property in section 25, a court should start and end its analysis by affirming the values of human dignity, equality and freedom.[153] Furthermore, when interpreting section 25 of the Constitution, it is important to keep in mind that property rights were often disregarded during the apartheid era. Property rights should be respected 'in the new dispensation, both by state and private persons'.[154] However, these rights should also be interpreted within the 'context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past'.[155] The court emphasised that property rights have never been absolute and that it is subject to

[148] 2004 (12) BCLR 1268 (CC) para 10.

[149] 2004 (12) BCLR 1268 (CC) para 10.

[150] 2004 (12) BCLR 1268 (CC) para 11.

[151] 2004 (12) BCLR 1268 (CC) para 14.

[152] 2004 (12) BCLR 1268 (CC) para 14.

[153] 2004 (12) BCLR 1268 (CC) para 15.

[154] 2004 (12) BCLR 1268 (CC) para 15.

[155] 2004 (12) BCLR 1268 (CC) para 15.

societal considerations.[156] It further explained, with reference to Van der Walt,[157] that section 25 contains an inherent tension between individual rights and social responsibilities. A court should employ this tension as a guideline when interpreting and applying section 25 rights in a property dispute.[158] Moreover, the purpose of section 25 is to protect private property rights as well as the public interest.[159] When interpreting the property clause one should move away from a

> 'typically private-law conceptualist view of the Constitution as a guarantee of the *status quo* to a dynamic, typically public-law view of the Constitution as an instrument for social change and transformation under the auspices of entrenched constitutional values'.[160]

In relation to section 26 of the Constitution, the court stated that it underscored the transformative public-law view of the Constitution envisaged by Van der Walt.[161] The court further emphasised the substantive interests that section 26(3) of the Constitution was designed to protect. Section 26(3) affords special protection to a person's 'place of

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[156] 2004 (12) BCLR 1268 (CC) para 16, with reference to *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (*FNB*) para 49. In *FNB*, Ackermann J explained that section 25(4)-(9) emphasises the need to rectify the vastly unequal distribution of land in South Africa. These provisions must be kept in mind when interpreting section 25 because they emphasise that property is not an absolute right and that it is subject to societal considerations.

Van der Walt AJ *The constitutional property clause: a comparative analysis of section 25 of the South African Constitution of 1996* (1997) 11.

[158] 2004 (12) BCLR 1268 (CC) para 16, with reference to Van der Walt AJ *The constitutional property clause: a comparative analysis of section 25 of the South African Constitution of 1996* (1997) 15-16, as quoted in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 50.

[159] 2004 (12) BCLR 1268 (CC) para 16, quoting from *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 50-52.

[160] 2004 (12) BCLR 1268 (CC) para 16, with reference to Van der Walt AJ *The constitutional property clause: a comparative analysis of section 25 of the South African Constitution of 1996* (1997) 15-16, as quoted in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 52.

[161] 2004 (12) BCLR 1268 (CC) para 17.

abode', and it acknowledges that a home provides more than just a roof over one's head.[162] A home is a place of personal intimacy and family security, and it is often 'the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world.'[163] The court concluded that the Constitution recognises that land rights, the right to have access to housing, and the right not to be arbitrarily deprived of a home 'are closely intertwined.'[164]

6 5 3 Social obligation of the owner

One of the themes running through the *Port Elizabeth Municipality* judgment is that under the Constitution it is expected of property owners to exercise their rights in a socially responsible manner and in a way that advances rather than undermines the public interest. There is a strong argument to be made that ownership of an inner-city building is accompanied by a range of social obligations, including the duty to prevent a building from falling into a state of disrepair.[165] This duty should be understood with reference to Alexander's social obligation norm. When exercising ownership entitlements, the land owner has a duty to refrain from causing harm to the community of which he forms part. A dilapidated building can pose a threat to the safety of the public and can contribute to the general decay of inner-city areas. One can argue that a property owner has a social obligation to prevent his buildings from being injurious to

[162] 2004 (12) BCLR 1268 (CC) para 17.

[163] 2004 (12) BCLR 1268 (CC) para 17.

[164] 2004 (12) BCLR 1268 (CC) para 19.

[165] In *Mkontwana v Nelson Mandela Metropolitan Municipality and another; Bisset and others v Buffalo City Municipality and others; Transfer Rights Action Campaign and others v MEC, Local Government and Housing, Gauteng, and others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) paras 58-59, the Constitutional Court explained that it was reasonable to expect of the owner of to pay for water and electricity debts incurred by even unlawful occupiers of his land. The court reasoned that it was the responsibility of the owner to ensure that his property was not unlawfully occupied, or alternatively, to secure the eviction of unlawful occupiers. From this decision one can infer that the owner also has the duty to maintain an unlawfully occupied building. The duty must ensure that a building meets the health and safety standards set in legislation even if it is unlawfully occupied.

society.[166] In addition to his social obligation to maintain a building, the property owner has a statutory duty to ensure that the building complies with legislation such as health and safety by-laws. This means that the property owner has a duty to ensure that the building is properly maintained and meets the standards set in legislation, even if it is unlawfully occupied. One can therefore conclude that the owner has the responsibility to maintain his building so that it does not pose a threat to the lives and property of others.

In light of the current housing shortage, one can further argue that owners have a social obligation to ensure that their buildings are not left vacant and that they are put to good use. In fact one can even go as far as saying that it is careless of an owner to allow his inner-city building to stand empty and unused in circumstances where he has no intention to use the building in the near future and where that building could provide much needed housing to the homeless. This notion might seem drastic. However, this was more or less the line of reasoning adopted in the Netherlands during the 1970s and 1980s when the *kraker* movement prompted the enactment of legislation, the Leegstandwet 1986, designed to deter land owners from allowing their inner-city property to remain unused and unoccupied in areas where there was a housing shortage. This act enabled the local authorities to take control of vacant buildings that could be used for social housing purposes. The rationale for the Act was that it was considered socially irresponsible of land owners to allow buildings, which were held for speculation or development purposes, to remain vacant when there was an acute housing shortage. Accordingly, the owners' rights in relation to their property would not have been protected so strictly in circumstances where they acted recklessly.[167]

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[166] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 795 explains that the owner has an obligation, in addition to the social obligation to ensure that his building is safe and healthy, to ensure that the aesthetic features of the building are preserved.

[167] See in this regard Van der Walt AJ 'De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip: een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerende goed en dakloosheid' (1991) 17 *Recht en Kritiek* 329-359 at 334-339 and Van der Walt AJ *Property in the margins* (2009) 137-141 for a discussion of the *kraker* movement, the Leegstandwet 1986 and the most prominent Dutch cases from that era.

Port Elizabeth Municipality explained that in the South African milieu the owner's responsibility in relation to his building should be understood within the context of apartheid forced removals and demolitions that contributed, in part, to widespread homelessness. This responsibility can also be relayed back to Alexander's social-obligation theory. Access to housing is one of the elements that are essential to human flourishing.[168] A land owner can only flourish within the structures that are provided by the community. As a rational and moral member of the community the land owner should recognise that everyone has the right to flourish and this may mean that the owner must, to some extent, contribute to the structures that would at least facilitate

[168] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 790.

human flourishing.[169] Importantly, this argument is subject to the qualification that the social obligation of the owner (as described in this dissertation) does not mean that the owner must contribute some of his land for social housing purposes, although it can be expected of the land owner to temporarily tolerate the continued unlawful occupation of his land while socially inspired eviction procedures take their course. It remains the state's duty to provide housing for the poor. The social obligation theory serves as a justification for imposing regulatory laws (such as PIE) that compel the land owner to endure continued unlawful occupation of his land, if he recklessly allowed his property to stand vacant in the midst of a housing shortage, while the law of eviction takes its course. In view of the accommodating nature of post-apartheid anti-eviction laws, these

[169] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 790 made this argument in relation to *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* (*Modderklip*) 2004 (6) SA 40 (SCA). In *Modderklip* the court ordered the state to pay compensation to the owner instead of ordering eviction of the unlawful occupiers. Compensation was an appropriate remedy because it reimbursed the owner for the temporary but extended loss of the use of his land and it enabled the squatters to remain on the land while the local authority made alternative arrangements. Alexander argues that the property owner had a social obligation to allow the occupiers to remain on his land until they could be accommodated properly on another suitable site. At 790 Alexander explains that '[a]s a large landowner, *Modderklip* is under an obligation to contribute from its own property in order to assist in providing the squatters with the opportunity to obtain the resources they need to flourish'. In the meantime, the court would protect the owner's property rights by means of a liability rule. Compare the *Modderklip* decision with the more recently decided *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) (*Blue Moonlight*) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA). See further the discussion in chapter 2, section 2 3 3 and chapter 5, section *5 4 2 2*. It should be noted that Alexander's argument on 790 (based on his interpretation of the *Modderklip* decision), that the social obligation norm requires of a 'large' land owner to contribute 'from its own property' to assist with providing the structures necessary for the community to flourish goes beyond the arguments raised in this dissertation. This chapter purely argues that the social obligation norm explains why it can, in some instances, be expected of land owners to tolerate the temporary unlawful occupation of their property. In so doing, land owners contribute in part to create an environment where the community can at least start to address the current housing shortage.

processes will place a high value on justice and human dignity and the land owner may therefore have to endure continued occupation of his land for longer than he may have anticipated. In certain extreme cases, the owner may not be able to obtain an eviction at all.

The continued occupation of the affected land owner's land or building in such instances will not necessarily go uncompensated. Compensation can take on the form of rental income or the costs of renovations borne by the state in the course of the regeneration of the building. Chapter 5, section 5 4 2 2 explained that the continued unlawful occupation of property does amount to a deprivation of property and the *FNB* substantive arbitrariness test will show when such as deprivation results in an excessive interference with property rights. However, generally the temporary unlawful occupation of land will not amount to arbitrary deprivation of property. Furthermore, the land owner's rights can be protected by a liability rule (constitutional damages) in circumstances where this interference with property rights becomes unjustifiable. A compensatory award will alleviate the otherwise disproportionate burden imposed on the land owner. Finally, the regulatory scheme can also make provision for the expropriation of the unused land – perhaps at a reduced price – to provide low cost housing to indigent persons.

Singer argues that there are instances where land owners are morally and legally compelled to use their property in a way that benefits other persons.[170] Owners are entitled to use their land to further their own interests but they cannot ignore how the use of their property will impact on others. Moreover, the tensions and conflicts in a property system can sometimes encourage owners to act in the interests of non-owners and other land owners rather than in self-interest.[171] The arguments raised by Singer are more extensive than the arguments put forward in this dissertation. There may be support for the notion that land owners may have to actively use their land in a way that is beneficial to others. Likewise, there may be support for the view that owners can (and should) be encouraged to use their land to promote the interests of others rather than

[170] Singer JW *Entitlement: the paradoxes of property* (2000) 16-18.

[171] Singer JW *Entitlement: the paradoxes of property* (2000) 16-18.

their own self interests. However, it is beyond the scope of this dissertation to explore the nature, extent and consequences of Singer's arguments in this regard. It suffices to say that Singer's reasoning supports the argument that owners have the obligation to refrain from allowing their buildings to become vacant when there is a housing crisis. It is expected of owners to consider how their use of their property, or even the non-use of their property, will affect others.

Case law has confirmed that the owner is not entitled to an immediate eviction order in circumstances where his building has become unlawfully occupied, irrespective of whether he was negligent in allowing the occupation to take place.[172] Arguably the owner has the obligation to temporarily tolerate the continued unlawful occupation of his land until the occupiers can be accommodated suitably elsewhere. Singer reasons that there are some instances where the owner has an obligation to share his wealth with indigent persons.[173] In so doing, the owner contributes to the structures that are put in place to relieve poverty and, which will hopefully enable poor persons to also become property owners. Singer's line of reasoning goes beyond the arguments raised in this dissertation. It should be emphasised that this dissertation does not suggest that the land owner should share his wealth with the poor. This dissertation simply argues, on the basis of decisions such as *Blue Moonlight*[174] and *Modderklip*,[175] that there are instances where one can expect of a land owner to temporarily tolerate the unlawful occupation of his land.

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[172] *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) para 103.

[173] Singer JW *Entitlement: the paradoxes of property* (2000) 17-18.

[174] *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* 2009 (1) SA 470 (W); *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA).

[175] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

Singer also argues that there are instances where the moral obligations of the owner should be made legally compulsory.[176] Arguably this is essentially the function of PIE, which enables the courts to postpone the eviction of unlawful occupiers. Land owners are accordingly legally (and morally) obligated to temporarily tolerate the continued unlawful occupation of their land if the courts find that they cannot order the immediate eviction of occupiers because eviction has to be carried out in a way that satisfies the constitutional demand for justice and respect for human dignity. This was confirmed in *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* (*Blue Moonlight*),[177] where it was emphasised that PIE affords a court the power to delay the eviction of unlawful occupiers.[178] This means that the owner will not necessarily obtain an eviction order, even though he has followed all the correct procedures. Essentially, the court can compel the owner to bear the burden of the continued unlawful occupation of his land until it is just and equitable to grant an eviction order. What is more, the court indirectly obliges the owner to postpone the demolition of the unlawfully occupied building and the subsequent development of the land. In so doing, the court can at least facilitate the *orderly* opening up of secure property rights to those who were denied them in the past and it can ensure that eviction takes place in a fair manner and 'preferably with a specific plan of resettlement in mind.'[179] The obligation of the owner to temporary tolerate the continued unlawful occupation of his land is born from the community's desire to provide the occupiers with alternative and more secure accommodation. This social obligation is further a response to the era of apartheid forced removals and evictions, when unlawful occupiers were treated in a cruel and undignified manner. The owner is, in essence, forced to postpone his demolition plans because this affords the local authority time to obtain and provide the necessary resources (alternative accommodation or temporary emergency

[176] Singer JW *Entitlement: the paradoxes of property* (2000) 17-18.

[177] [2010] ZAGPJHC 3 (4 February 2010).

[178] [2010] ZAGPJHC 3 (4 February 2010) para 103.

[179] *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 34 with reference to *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and others* 2000 (2) SA 1074 (SECLD) 1087.

accommodation), which is a step towards creating an environment where the occupiers can prosper. As a member of the community the land owner is morally obliged to play a role in rectifying the apartheid injustices. In this regard, the owner is expected to endure the temporary continuation of the unlawful occupation of his land in some instances.[180] A weighing of interests (as required by the *FNB* substantive arbitrariness test) will show when the delay in eviction will have a smaller negative impact on the land owner compared to the detriment suffered by the unlawful occupiers if they are evicted immediately. Explained differently, the *FNB* substantive arbitrariness test will show when there will be sufficient reason for the deprivation caused by the delay in the eviction process. The land owner will not be arbitrarily deprived of his property if there is

[180] Penalver EM and Katyal SK 'Property outlaws' (2007) 155 *U Pa L Rev* 1095-1186 at 1097-1104 and 1122-1128 argue that intentional property law breakers (referred to as property outlaws) such as urban squatters are vital in legal systems because they are the driving force behind legal change. Urban squatters challenge existing property regimes and they force society to re-evaluate why certain property interests should be protected. Law breaking is also an informal way for some people to access property regimes from which they have previously been excluded. In so doing, law breakers can bring about a change in an otherwise stagnant legal system. This change can include formal and legal recognition of the law breakers' rights. Penalver and Katyal refer to an urban squatting movement that operated in US cities during the 1970's and 1980's. The purpose of the movement was, amongst other things, to draw attention to the derelict state of certain poor urban areas and to express dissatisfaction with the failure of the government to provide low-income housing in the cities. Some of the squatters also intended to become the owners of the mostly abandoned properties which they occupied. The squatting movement was successful to some extent since in certain cities, such as New York, the buildings were restored and title was transferred to the squatters. This movement described by Penalver and Katyal is comparable to the unlawful occupation of some buildings in South African cities. Currently, there is a massive housing shortage in especially urban and peri-urban areas. The unlawful occupation of vacant structures draws attention to the dire circumstances of marginalised South Africans. It also highlights the fact that the ownership of land and property in South Africa is still, more or less, divided along racial lines. Finally, the unlawful occupation of vacant inner-city buildings, in particular, may prompt local authorities to restore the structures for social housing purposes. In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC), the court explained that some of the abandoned properties should be restored instead of demolished. These buildings had become the homes of hundreds of occupants and it would be beneficial to allow them to remain on the property temporarily or even permanently.

sufficient reason for the delay in the eviction of the occupiers. Essentially, the *FNB* non-arbitrariness test directs a court to balance the owner's interests that are affected by the delay in eviction with the benefit that the occupiers will draw from the delay (time to find alternative accommodation and treated in a more dignified manner). The delay in eviction will not amount to an arbitrary deprivation of property if the balancing enquiry shows that the occupiers' interests outweigh the owner's interest in speedy eviction.

One can further argue that from a planning perspective it makes sense for a court to force the owner to either postpone demolition of the building or, in some circumstances, to abandon his demolition plans altogether. The planning stage of the eviction process is crucial because local authorities have the duty not only to find alternative accommodation for unlawful occupiers, but also to ensure that they do so in a way that promotes the sustainable and healthy growth of the city.[181] Moreover, there is a real possibility that the local authority will decide that it would be preferable to expropriate and upgrade the building instead of removing the occupiers. One of the factors that the court in *City of Johannesburg v Rand Properties (Pty) Ltd and others* (*Rand Properties*)[182] took into account in denying the application for an eviction order was the fact that the occupiers had attempted to render the building safer and more habitable. The court held that this was an example of where the residents (of the building) and the city could 'improve their respective lots in a mutually constructive fashion'.[183] In light of the *Rand Properties* decision, one cannot preclude the possibility that once it has considered all the relevant circumstances the city will decide to incorporate the building into its housing scheme.[184]

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[181] In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC) para 16 it was stated that a city has constitutional obligations towards the occupants of Johannesburg. These obligations include promoting social and economic development and the duty to improve the quality of life for all citizens.

[182] 2007 (1) SA 78 (W).

[183] 2007 (1) SA 78 (W) para 61.

[184] In the later decision, *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2004 (12) BCLR 1268 (CC) paras 24-26, the city and the occupiers reached an agreement that the former would take steps to render the building more habitable.

The land owner's obligation to tolerate the continued unlawful occupation of his land is not without limits. As explained above, the *FNB* substantive arbitrariness test requires the balancing of the land owner's and unlawful occupiers' respective interests. Once a court has considered the complexities of the relationships involved in the dispute, it would be able to determine whether law of general application (most likely PIE) provides sufficient reason for the deprivation (the delay in eviction) and further, whether that law is applied in a procedurally unfair manner. In some instances the court will find that the delay in eviction disproportionately burdens the land owner, especially if it endures for too long and if it deprives the owner of all use of the land. Chapter 5 section *5 4 2 2* explains that apart from *Modderklip*, case law has not yet indicated when the continued unlawful occupation of private land will amount to an unjustifiable interference with property rights. With reference to the series of *Blue Moonlight*[185] decisions, section *5 4 2 2* delineates some of the factors that may have a bearing on a substantive arbitrariness enquiry. This section concludes that indefinite continuation of unlawful occupation of land or buildings will probably constitute a disproportionate burden on the land owner. In such circumstances the land owner is deprived of all economic use of his property and he is singled out to bear a burden that should be spread over the community as a whole. In *Blue Moonlight*[186] the South Gauteng High Court stressed that the state cannot abdicate its section 26 housing duties and shift them onto the private sector. It remains the duty of the state to provide unlawful occupiers with access to adequate housing.[187] Even in cases where the state attempts to provide alternative accommodation the owner cannot be expected to bear the brunt of the burden in the form of indefinite postponement of the eviction.

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[185] *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* 2009 (1) SA 470 (W); *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA).

[186] *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) para 97.

[187] *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) para 97.

The South African courts have previously protected property rights in circumstances of this kind by ordering the state to pay constitutional damages when it is neither just nor equitable to order the eviction of the occupiers or to allow the continued unlawful occupation of land, with the effect that the land owner was burdened with the seemingly indeterminate obligation to endure the continued unlawful occupation of his land.[188] Explained differently, the courts have in some instances elected to protect property rights by way of a liability rule (compensation) instead of a property rule (eviction) when it became clear that the property rule (eviction) was practically not feasible and that the land owner cannot simply be expected to endure the unlawful occupation indefinitely.[189] The purpose of such a compensatory award was, as illustrated in *Modderklip*, to alleviate the otherwise excessive burden imposed on the land owner. Chapter 2, section 2 3 4 argues that the constitutional damages ordered in

[188] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) and *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010).

[189] Alexander GS 'The social obligation norm in American property law' (2009) 94 *Cornell L Rev* 745-820 at 791 explains, with reference to the *Modderklip* decision, that the best solution in circumstances where squatters have resorted to self-help to obtain a form of housing is for a court to craft a remedy that clearly outlines the rights and obligations of all the parties involved. Such a remedy can include a liability rule instead of a property rule to protect property rights. This means that the owner would be compensated for the loss of the use of his land, but he will not obtain an eviction order to regain possession of his property. The Supreme Court of Appeal's finding in *Modderklip* was followed in *Blue Moonlight Properties 39 (Pty) Ltd v the occupiers of Saratoga Avenue and another* [2010] ZAGPJHC 3 (4 February 2010) (*Blue Moonlight*) when the court ordered the city to pay the applicant constitutional damages equivalent to the loss of rental income for the time period that the building was unlawfully occupied. This decision was set aside in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2011 (4) SA 337 (SCA) where the court held that Blue Moonlight differed from *Modderklip* in various respects. The gist of the court's findings was that the interference with the land owner's rights in *Modderklip* was far more drastic than in the case of *Blue Moonlight*. It was therefore justifiable to grant constitutional damages in the case of *Modderklip* but not in the case of *Blue Moonlight*. See the discussion in chapter 5, section 5 4 2 2.

Modderklip is comparable to German equalisation measures that are designed to mitigate disproportionate but legitimate and socially desirable regulatory interferences with property rights. *Modderklip* is therefore authority for the argument that if the regulatory interference with property rights goes too far, it is possible to protect property rights by way of an equalisation-style liability measure instead of declaring the regulatory law invalid. This is desirable because it can prevent a law, with an otherwise legitimate and important function, from being declared invalid and unconstitutional on the basis of section 25(1). In sum, a court can restore an imbalance by way of an equalisation measure, if the *FNB* substantive arbitrariness test shows that there is no longer a proportional relationship between means (deprivation) and ends (the purpose of the deprivation). Importantly, there may be instances where even a compensatory award will alleviate the disproportionate burden imposed on the land owner by the continued unlawful occupation of its property. *Port Elizabeth Municipality* provides that in such instances, the court may order the eviction of the occupiers.[190]

Section *5 4 2 2* argues that PIE does not currently adequately protect the land owner when the unlawful occupation of land amounts to an excessive interference with his property rights. This implies that PIE is open to a constitutional attack on the basis of section 25(1). Arguably, it is necessary to incorporate a German-style equalisation measure into PIE which will enable the courts to protect land owners from otherwise disproportionate burdens imposed in terms of the Act. It is true that the necessity for such a measure in PIE is reduced somewhat by the possibility of awarding constitutional damages, as was done in *Modderklip*. Importantly, there is one fundamental difference between the German equalisation measure and the *Modderklip* constitutional damages. German equalisation measures are written into legislation to mitigate excessive burdens that can be caused in very specific circumstances. Constitutional damages are awarded by the court and there is some uncertainty as to when it would be justified to grant such a remedy and how it should be calculated. One can conclude that it is imperative to develop the South African law so that it caters more clearly and explicitly for excessive loss or damage caused by lawful state action.

[190] *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 21.

6 5 4 Alternative perspective

Radin's distinction between fungible and personal property is an alternative way to explain why the unlawful occupiers' interests should be protected more strongly than the right of the owner to demolish his building.[191] She explains that certain objects are closely linked with personhood because 'they are part of the way we constitute ourselves as continuing personal entities in the world'.[192] One can measure the strength of a person's connection with an object by considering the pain that he will suffer if he is deprived of the object. An object will constitute property for personhood if its loss results in pain that cannot be relieved by the replacement of the object. This kind of property is referred to as personal property.[193] Radin argues that an object or property is held for instrumental reasons if it can easily be replaced with another good such as money.[194] Property held for instrumental reasons is described as fungible property.[195] The 'personhood perspective' provides a dichotomy that can accurately explain why certain forms of property should be protected above others.[196]

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[191] Radin MJ 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015. For a critique of Radin's work refer to Schnably SJ 'Property and pragmatism: a critique of Radin's theory of property and personhood' (1993) 45 *Stan L Rev* 347-407. The distinction drawn by Radin is comparable to the distinction drawn in German law between property that is owned to ensure personal autonomy and liberty and property that is held for other purposes. Property held for reasons other than personal autonomy and liberty will be subjected to more severe regulations and limitations. See the discussion in chapter 4, section 4 5 1.

[192] Radin MJ 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015 at 959.

[193] Radin MJ 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015 at 961 explains that it does not necessarily follow that property 'deserves moral recognition or legal protection' once it has been established that it is of a personal nature. The reason for this is that a person can have a bad personal connection with property. Radin reasons that a person should not 'invest oneself in the wrong way or to too great an extent in external objects'. She uses the example of a fetishist who has an abnormally strong connection with property. A person will first have to show that the connection that he has with property is good rather than bad or excessive in order to have a moral claim for the protection of that property.

[194] Radin MJ 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015 at 959-960.

[195] Radin MJ 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015 at 960.

[196] Radin MJ 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015 at 979.

Radin suggests that to justify the more stringent protection of certain forms of property one should visualise a continuum from personal to fungible property. Property that falls closer to the personal side should be more strictly protected than property that is closer to the fungible side of the continuum. The implication of this approach is that if two parties hold interests in the same property, one a personal interest and the other a fungible interest, the personal interest should probably override the fungible interest. Therefore, the 'personhood perspective' creates a hierarchy of entitlements.[197] The closer the property is to personal property, the stronger the entitlement.[198] In the final paragraph of her article Radin states that there is a *prima facie* case to be made that personal property interests should, at least to some extent, be protected from government intervention and competing fungible property interests of other people. She concludes that

> '[t]his case is strongest where without the claimed protection of property as personal, the claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened...'[199]

Radin's work is not entirely unrelated to Alexander's social-obligation norm, because she essentially argues that certain forms of property enable human beings to prosper. She acknowledges that these forms of personal property are not always owned by the persons who have come to rely on it for their survival. The implication of Radin's theory is that when faced with a conflict between personal and fungible property interests, the court may in some instances afford more protection to personal property interests. For instance, in an eviction dispute the unlawful occupier has a personal interest in the building, unlike the owner whose interest falls closer to the fungible side of the continuum. The occupier stands to lose much more than the owner once he is evicted

[197] Radin MJ 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015 at 986.

[198] Radin MJ 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015 at 986 explains that fungible property is not necessarily unrelated to personhood but 'distinctions are sometimes warranted depending upon the character or strength of the connection'.

[199] Radin MJ 'Property and personhood' (1981) 34 *Stan L Rev* 957-1015 at 1015.

and the building is demolished.[200] The only consequence for the land owner would perhaps be that he no longer has the financial burden of maintaining the building. By contrast, the demolition of the building will cause the occupiers to lose their physical shelter, which can result in homelessness. The demolition of the building can further result in the occupiers being forced to leave the neighbourhood where they earned a livelihood, fostered community networks and made use of amenities such as schools, clinics and churches.[201] Moreover, the occupiers possibly also invested some money in making the building their home. Clearly, the demolition of the building will result in losses suffered by the occupiers that are disproportionate to the benefits obtained by the owner.[202]

Radin's theory suggests that in a dispute of this kind, the court may protect the unlawful occupiers' personal property interests over the fungible property interests of the land owner. The distinction between personal and fungible property interests

[200] The occupiers' relationship with the building can also be explained with reference to the 'home interest' as developed by Fox L *Conceptualising home: theories, laws and policies* (2007) 128-129. The central premise of Fox's theory is that the 'home interest' is an under-developed concept in legal discourse and that more often than not this interest, when posed against the commercial interest in a property, will be disregarded by legislative and judicial policy makers. This could be attributed to the fact that home is a subjective interest that is not easily measured or easily proved in a court room.

[201] Fox L *Conceptualising home: theories, laws and policies* (2007) 15 and 79-80 explains that to the occupiers, a home has, amongst other things, a financial, emotional, social and psychological facet. Unfortunately, these facets are difficult to present relative to the commercial interests of the property owner.

[202] Fox L *Conceptualising home: theories, laws and policies* (2007) 15,28 and 145-146 argues that one should have a clear understanding of the nature of all the respective interests, and especially the home interest involved in a dispute, so as to effectively balance the rights of the occupiers and property owners. She proposes that the concept of a home should be evaluated with reference to this formula: home= house +x. The 'house' in the equation refers to the physical structure whereas 'x' refers to the intangible feelings that a person can have in relation to his home. Within the context of unlawfully occupied buildings, the building owner's interest will only comprise the physical structure and the investment value. By contrast, the unlawful occupier's interest refers to the physical structure as well as all the other facets of his life that he was able to build as result of his occupation of that structure. Viewed from this perspective it is clear that the occupier's home interest should outweigh the property owner's right to demolish the structure.

accordingly explains the purpose of legislation such as PIE, which authorises the court to delay the eviction of unlawful occupiers if, after considering all the circumstances, it finds that it is not just or equitable to grant (or to enforce) the eviction order. In such circumstances the property owner's fungible demolition rights should, at least temporarily, yield to the unlawful occupiers' personal interests in the building. This means that the land owner will not necessarily be compensated for the continued unlawful occupation of his land.

However, there may be instances where it is vital to protect the land owner's fungible property interests by way of a liability rule (an equalisation measure). Typically this would be where the court cannot order the eviction of the occupiers (or where the eviction order cannot be enforced) but where it is found that the continued unlawful occupation of the land owner's land amounts to a disproportionate interference with his property rights. Under these circumstances an equalisation measure (monetary compensation) will adequately protect the land owner's fungible interests. Radin's theory supports this line of reasoning because it suggests that the court can protect the unlawful occupiers' personal property interests by awarding the land owner a compensatory award (liability rule) rather than an eviction order (property rule).

6 5 5 Conclusion

The section above described the range of obligations that an owner has in relation to his inner-city building. It should be emphasised that the nature of the property, in this case land, and its locality (congested urban area) impacts on the responsibilities that the owner has towards his community. These responsibilities should also be understood against the background of the relevant historical and constitutional context described in *Port Elizabeth Municipality v Various Occupiers.*[203] Although it is not a closed list, the above discussion identified three obligations that the owner has in relation to his land. Firstly, the land owner must maintain the building situated on his property so that it complies with legislation. This obligation exists even if the building is unlawfully

[203] 2004 (12) BCLR 1268 (CC).

occupied, since the owner does not have the right to allow his property to cause harm to others. Secondly, it is irresponsible of the owner to allow his building to stand vacant and unused simply because he does not have any use for that building and where it could be used for social housing purposes. The section above argued that the social obligation theory may justify the enactment of legislation which regulates that land owner's rights (and specifically his use entitlement) in relation to such a building. It is beyond the scope of this dissertation to determine the exact scope and inner workings of this type of legislation. It suffices to say that a law of this kind may authorise the local authority to take control of the building so that it can be used for social housing purposes. This may mean that the local authority will possibly have to bear the costs of renovations and management of the building. Furthermore, a land owner will not necessarily go uncompensated since the law can provide that the land owner will be entitled to rental income generated from the use of the building or some other form of compensation. The law can also authorise the expropriation of the land – perhaps at a reduced price – for the purposes of social housing. Importantly, as Singer suggests, land owners should consider how the use or non-use of their buildings affects other members of their community.

Thirdly, the owner has a negative obligation to temporarily tolerate the continued unlawful occupation of his land if, at that moment in time, the court finds that it is not just or equitable to grant an eviction order. The court does have the power to postpone the eviction of the unlawful occupiers and this will by implication affect the owner's plans to demolish the unlawfully occupied building so that he can proceed to develop the land. This sense of obligation expresses the broader goal of a well-functioning society where the gap between poor and rich is addressed, at least in a defensive manner. It is furthermore desirable from a planning perspective that unlawful occupiers temporarily continue to be accommodated on the land which they have made their home. This would give the relevant officials time to make appropriate plans to accommodate the occupiers in other suitable accommodation. Generally, this would be a more efficient process than forcing the occupiers to find alternative illegal accommodation, which would further exacerbate the problem. The owner's obligation to temporarily bear the continued unlawful occupation of his land can be explained with reference to the social-

obligation theory and Radin's distinction between fungible and personal property. An owner is obliged to contribute to the structures that will enable his community to flourish. Currently, there are hundreds of thousands of South Africans who do not have access to adequate housing and it can be expected of land owners not to use their property in a way that would exacerbate this crisis. This does not mean that the land owner must contribute parts of his land for social housing purposes. The courts have confirmed that the state cannot abdicate its housing duties and shift them onto the private sector. However, there may be instances where the land owner would not be entitled to an immediate eviction order when his building is unlawfully occupied. The courts are authorised to delay the eviction of unlawful occupiers in certain instances. This means that it can be expected of land owners to temporarily tolerate the continued unlawful occupation of their land without compensation. The social-obligation theory provides a basis for understanding why it can be expected of land owners to make these sacrifices. By tolerating the temporary continued unlawful occupation of his land, a land owner contributes in some way to the social structures that help his community to flourish; at the very least, he does not exacerbate the problem. Radin's theory also finds application in eviction disputes. In the South African context, housing remains a contentious issue and practically speaking, the delay in the eviction process will not magically resolve the homelessness issue. Nevertheless, the delay in eviction at least affords local authorities time to determine whether it can accommodate the unlawful occupiers elsewhere, once evicted. If nothing else, the delay in eviction is an attempt to treat the unlawful occupiers in a more dignified manner.

Finally, the obligation to tolerate the continued unlawful occupation of private land is not absolute. There are instances where the continued unlawful occupation of private land will disproportionately burden the owner. However, apart from eviction and demolition there are other ways to protect the owner's rights when an eviction order cannot be granted, namely equalisation measures (liability rules). Radin's theory is useful since it helps one to understand why, in some instances, private land rights are protected by liability rules rather than property rules. Radin's theory suggests that in the example of the unlawful occupier personal property interests are at stake. Often the courts will protect these personal property interests by granting the land owner (who has

fungible property interests) a compensatory award (liability rule) instead of eviction (property rule). It is also possible that the state will in some instances elect to order the expropriation of the unlawfully occupied property. In so doing, the state protects both the interests of the land owner and the occupier.

In conclusion, the *FNB* substantive arbitrariness test provides a framework within which one should assess the extent to which a regulatory measure interferes with the land owner's right to use, enjoy and exploit his property. This test specifically provides that one should determine whether the law of general application provides sufficient reason for the deprivation or is procedurally unfair. The *FNB* substantive arbitrariness enquiry indicates when the social obligation of the land owner amounts to a burden that should be borne by the community in general. It is imperative to engage with the complexities of the various interests affected by the regulation of property rights in a specific instance. In so doing, one will be able to establish whether a particular obligation of the land owner (a deprivation authorised by legislation) amounts to an overly excessive interference with property rights. A regulatory measure can be declared unconstitutional and invalid if the *FNB* substantive arbitrariness test shows that there is insufficient reason for the deprivation of property rights. More specifically, the *FNB* arbitrariness test shows when there is no longer a proportional relationship between the deprivation (the delay in eviction and the concomitant consequences for the land owner) and purpose of the deprivation, namely enabling the local authority or unlawful occupiers to find alternative accommodation and the dignified and respectful treatment of those occupiers. Explained differently, this test shows when the land owner's interests outweigh the interests that are protected by the delay in eviction. Alternatively, the non-arbitrariness test might indicate where it would be necessary to alleviate the otherwise disproportionate burden of the land owner by way of an equalisation measure. An equalisation measure, incorporated into the authorising law, will prevent a finding that the law is invalid and unconstitutional on the basis of section 25(1).

6 6 Conclusion

The ownership of land comprises rights as well as duties. This has on more than one occasion been confirmed by the courts[204] and South African legal scholars.[205] These duties are often codified in legislation enacted in response to a specific need of the South African community. Zoning laws, for example, have been promulgated to ensure the orderly and healthy development of urban areas. Authors have also emphasised that the scope of the owner's obligations varies according to the nature of the property.[206] The obligations that the owner has in relation to his urban property, for example, differ from his obligations in relation to rural land. Furthermore, these obligations are contingent on socio-economic circumstances and they are likely to change as society evolves and circumstances change. There is therefore a strong argument to be made that the ownership of land is an inherently limited right. Stated differently, the ownership of land will always be subject to the restrictions that stem from the right itself or from legislation. An example of a limitation originating from ownership itself is that the owner does not have the right to use his land in a manner that will harm others. Legislation will also regulate the owner's use, enjoyment and exploitation of his property. Generally, land owners do not have the right to use their land in a way that is proscribed by legislation. Ownership entitlements are always subject to the limitations imposed by the law. This is implied by section 25(1) of the Constitution.

Importantly, section 25(1) also safeguards the rights of land owners by requiring that a deprivation must be authorised and imposed in terms of law of general application and it may not be arbitrary. A deprivation will be arbitrary if the law of general

[204] See for instance *Kings v Dykes* 1971 (3) SA 540 (C) 545 and *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C) 27.

[205] Cowen DV *New patterns of landownership: the transformation of the concept of landownership as plena in re potestas* (1984) 71; Milton JRL 'Planning and property' 1985 *Acta Juridica* 267-277 at 275; Van der Walt AJ 'The effect of environmental measures on the concept of landownership' (1987) 104 *SALJ* 469-479 at 476-479 and Van der Walt AJ 'De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip: een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerende goed en dakloosheid' (1991) 17 *Recht en Kritiek* 329-359 at 352-354.

[206] Cowen DV *New patterns of landownership: the transformation of the concept of landownership as plena in re potestas* (1984).

application does not provide sufficient reason for the particular interference with property rights or is procedurally unfair.[207] In *FNB* the Constitutional Court prescribed a nuanced test – the substantive arbitrariness test – to determine whether there is sufficient reason for a particular deprivation. The test directs the court to consider the complexity of relationships involved in a dispute and to weigh up all the contextual factors to determine whether the law of general application imposes (or authorises) excessive interferences with property rights. Essentially, the *FNB* non-arbitrariness test enables the court to ascertain when an individual land owner, or a group of land owners, are singled out to bear a disproportionate burden in the public interest. This test directs the court to balance the opposing interests involved in the dispute. In particular, the court should consider the purpose served by the deprivation and the extent of interference with property rights, A deprivation will be arbitrary, if considering the complexity of the relationships in the dispute and all relevant circumstances, the land owner's interests outweighs the outweigh the purpose served by the deprivation. In South Africa, a law will be declared invalid and unconstitutional insofar as it authorises or imposes an arbitrary deprivation of property. Explained differently, if the statutory interferences with property rights are deemed too excessive, and therefore arbitrary, the law can be set aside on the basis of section 25(1).

This approach may in some instances be problematic since it can result in the situation where a law, which fulfils an important function in society, is declared invalid because it authorises overly severe interferences with property rights. The South African courts have employed a remedy, constitutional damages, in instances where otherwise lawful state action results in the disproportionate interference with property rights, but this remedy is still in its infancy.[208] Constitutional damages are comparable to German equalisation measures, which are specifically incorporated into legislation to

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[207] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[208] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).

mitigate disproportionate loss or damage authorised by legitimate regulatory laws. One of the dominant themes in this dissertation is that provision for and use of equalisation-style measures is a useful and, in fact, necessary development in South African law because it enables the courts to better protect the land owner's rights in instances where a law imposes excessive interferences with property rights in the public interest, and where it is undesirable to declare that law invalid and unconstitutional for allowing arbitrary deprivation of property. The courts do not have the power to order the expropriation of property. Equalisation is not only an alternative way for the courts to protect property rights, but it can also indirectly force the state to consider (or reconsider) the possibility of expropriating the affected land owner's property because expropriation could be more cost effective. Moreover, properly drafted equalisation provisions could have a direction-giving function since they delineate the circumstances where the courts should mitigate otherwise disproportionate burdens imposed on land owners by the authorising law. Finally, equalisation measures are exceptional remedies that are not always available whenever property rights have been infringed. Rather, equalisation measures will become operative when laws impose excessive and potentially arbitrary limitations on an individual's (or specific group of land owners) exercise of ownership entitlements in the public interest.

This dissertation distinguished between three types of statutory interferences with property rights pertaining to demolition. Chapter 2 referred to limitations indirectly imposed on the owner's right to demolish unlawfully occupied buildings by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The central premise in this chapter is that land owners are not always entitled to an immediate eviction order when their property is unlawfully occupied. There are instances where it can be expected of land owners to tolerate the temporary continued unlawful occupation of their land. This interference with property rights will generally not amount to an arbitrary deprivation of property. However, there may be instances where the continued unlawful occupation of land results in an excessive and arbitrary interference with ownership entitlements. In such instances it may be necessary to protect ownership by way of a liability rule (a monetary award) to mitigate the disproportionate burden imposed on the land owner. Chapter 3 referred to the National

Building Standards and Building Regulations Act 103 of 1977 (the Building Standards Act), which authorises the local authority to apply to the court for a demolition order for unlawful and illegal buildings. The central premise in chapter 3 is that the land owner can only develop his property within the framework of the law. Buildings that conflict with legislation (illegal structures) should generally be demolished if they cannot be altered to comply with the standards set in the relevant laws. Likewise, buildings that conflict with the property rights of others should be demolished if they cannot be altered so that they no longer encroach on legitimate property rights of others. Chapter 4 referred to the limitations on the owner's right to demolish historic structures imposed by the National Heritage Resources Act of 25 of 1999 (the Heritage Resources Act). This chapter raised the hypothesis that the limitation imposed on the owner's right to demolish historic structures by historic preservation laws will in most instances not amount to an arbitrary deprivation of property. Nevertheless, there may be rare instances where the regulatory denial of the right to demolish a historic structure coupled with the financial duty to maintain an historic structure results in an excessive interference with ownership entitlements. In such instances it may be necessary to assuage the otherwise disproportionate burden imposed on the land owner (by the Heritage Resources Act) by way of an equalisation measure. Furthermore, it might be necessary to allow the demolition of a structure if there is no possibility of mitigating the disproportionate burden imposed on the land owner for purposes of historic preservation.

These three categories of interferences with property rights share certain similarities. Firstly, each of these regulatory measures can impact – to some extent – on a land owner's use entitlement, specifically his plans to develop his land. Legislation such as the Building Standards Act or zoning laws regulates the extent and nature of developments on a land owner's property. These regulatory controls are common and land owners are generally aware of how these measures affect their ownership entitlements. Similarly, historic preservation statutes, although not as common as building and development controls, can also interfere with the land owner's development plans. Compelling examples of this kind of interference are the famous

decision in *Penn Central Transportation Company v City of New York*[209] and, in the South African context, *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another*.[210] Both land owners in these cases were required to drastically curb their plans to develop their properties because of historic structures (protected by historic preservation laws) situated on their land. Anti-eviction legislation can indirectly authorise perhaps the most unforeseeable interference with ownership entitlements. Decisions such as *Blue Moonlight Properties 39 (Pty) Ltd v the Occupiers of Saratoga Avenue and another*[211] show that land owners may have to tolerate the temporary continued unlawful occupation of their land, which implies that they would have to postpone the demolition of the occupied structures and the further development of their properties.

Secondly, chapters 2-4 showed that in each of the instances, the regulatory laws cannot be applied inflexibly because it may result in too excessive interferences with property rights. Explained differently, the limitations imposed on ownership by building and development controls, historic preservation statutes and anti-eviction laws are not without boundaries. The *FNB* substantive arbitrariness test shows when the inflexible application of the law results in an arbitrary deprivation of property. Chapter 2 concluded that the strict enforcement of PIE can, in extreme cases, cause a situation where the continued unlawful occupation of land effectively deprives the land owner of all economic use of his property. Chapter 5 suggested that an equalisation-style measure, incorporated into PIE, can relieve the otherwise excessive burden imposed on the land owner in this instance. Moreover, an equalisation provision can prevent PIE from being impugned on the grounds of section 25(1). Chapter 3 illustrated that there are circumstances where one cannot force a land owner to demolish illegal structures, as required by law, because it can cause an arbitrary deprivation of her legitimate property interests, for instance in lawful parts of the building. Chapter 4 showed that the Heritage Resources Act can – like PIE – cause the land owner to bear a disproportionate burden in the public interest insofar as he is required to maintain an historic structure that he cannot use for any economically viable purpose, including selling the land. As in the

[209] 438 US 104 (1978).

[210] 2007 (4) SA 26 (C) and 2008 (3) SA 160 (SCA).

[211] [2010] ZAGPJHC 3 (4 February 2010).

case of PIE, chapter 5 argued that equalisation measures could mitigate the excessive burden that could potentially be caused by the Heritage Resources Act. In so doing, it could prevent the Heritage Resources Act from being set aside insofar as it authorises an arbitrary deprivation of property. However, chapter 5 explained that the Heritage Resources Act already incorporates measures that can arguably have an equalisation function.

There are also differences between these three categories of statutory interferences with property rights. Firstly, unlike historic preservation laws and anti-eviction legislation, building and development controls are more closely related to the traditional purpose of the state's police power, namely public health and safety. Historic preservation and anti-eviction laws are further removed from this core function and deprivations authorised by these laws will therefore be subjected to stricter scrutiny. This explains why equalisation measures were relevant in the case of unlawfully occupied structures (chapter 2) and historic buildings (chapter 4) but not in the case of unlawful and illegal buildings (chapter 3). Typically, equalisation measures alleviate excessive burdens than are imposed on an individual land owner (or group of land owners) by laws that fulfil an otherwise important function in society. Explained differently, equalisation comes into play if land owners are singled out to bear a disproportionate burden in the public interest. When a land owner builds an unlawful or illegal building, he automatically exposes himself to the potential demolition of the structure. Essentially, the land owner had put himself in the position where he is singled out to bear the burden on demolition. Given the underlying purpose of building and development legislation – safety and health – it seems illogical to protect the land owner's interests by an equalisation measure. By contrast, historic preservation laws and anti-eviction legislation often singles out land owners to bear a specific burden in the public interest. Equalisation is relevant in these instances because it protects the individual from having to bear excessive burdens which, in all fairness, should be borne by society as a whole. Furthermore, equalisation is necessary in thbese cases because historic preservation and anti-eviction laws promote causes further removed from the core function of police power, namely health and safety. Evidently, it is necessary to

protect land owners' rights more fiercely in the context of historic preservation and unlawfully occupied buildings than in the instance of unlawful and illegal structures.

Thirdly, the deprivations identified in chapters 2, 3 and 4 are imposed by different parties. PIE authorises the court to grant an eviction order if, after considering all the relevant circumstances, it finds that it is just and equitable to evict the occupiers. This means that the deprivation – the delay in the eviction of unlawful occupiers and the subsequent postponement of demolition and development plans – is imposed by the court order. The Building Standards Act authorises the local authority to apply for a demolition order for unlawful and illegal buildings. In this instance the deprivation is caused by administrative action - the local authority's decision to apply for a demolition order. Likewise, in the case of historic preservation the deprivation is a result of the heritage authority's decision to deny a demolition permit and, further, to protect the historic structure under the Act. This means that in the case of deprivations caused by building and development controls and historic preservation laws, land owners may have administrative law remedies available.

Finally, when it comes to disputes concerning the eviction from, and the demolition of, unlawfully occupied buildings, two constitutional rights are in conflict, namely section 26(3) and section 25(1). Chapter 2 explains that section 26(3) was expressly incorporated into the Constitution in response to the apartheid abuses of eviction and demolition orders. PIE was in turn promulgated to give effect to the values enunciated in section 26(3). Deprivations authorised by PIE are therefore unique in the sense that they should be understood and analysed within the relevant apartheid *and* constitutional contexts.

Almost a century ago, the Black Land Act 27 of 1913 became one of the first laws that indirectly authorised the demolition of dwellings along racial lines. By the mid-twentieth century, apartheid policies were proactively pursued. Apartheid laws such as the Prevention of Illegal Squatting Act 52 of 1951 expressly employed private land owners and local authorities' eviction and demolition powers to further apartheid ideals. These laws operated from the assumption that ownership is an absolute and inviolable right. One of the consequences of these discriminatory practices was the major socio-

economic inequalities still in existence in contemporary South African society. The Constitution seeks to redress these inequalities through a number of provisions. In terms of demolition, the most important provisions, as shown in this dissertation, are section 25(1) and 26(3) of the Constitution. The watershed case *FNB* gave content and structure to a section 25(1) challenge. Similarly, *Port Elizabeth Municipality v Various Occupiers* set out the interaction between section 25(1) and section 26(3). In so doing the Constitutional Court emphasised, in contrast to the apartheid era, that ownership will sometimes have to yield to the rights of others, such as the section 26(3) rights of unlawful occupiers. Both *FNB* and *Port Elizabeth Municipality* illustrate that demolition is a constitutional issue.

The past 100 years have seen drastic changes from a dispensation that protected the interests of a selected few to a constitutional regime that aims to safeguard the rights of all citizens. This dissertation has highlighted two developments that may have significant implications for South African law. The first development is the more active pursuance of the duties that accompany the ownership of property and especially the ownership of land. The second development is the possibility of incorporating equalisation measures to protect land owners from excessive losses caused by otherwise lawful state action. Embracing these two developments could set in motion a century of positive change, rooted in the values of the Constitution, as far as demolition orders are concerned.

Abbreviations

ASSAL – Annual Survey of South African Law

B C Envtl Aff L Rev – Boston College Environmental Affairs Law Review

Can J Law & Jur – Canadian Journal of Law and Jurisprudence

CCR – Constitutional Court Review

Colum J Envtl L – Columbia Journal of Environmental Law

Colum L Rev – Columbia Law Review

Conn L Rev – Connecticut Law Review

Cornell L Rev – Cornell Law Review

Fla St U L Rev – Florida State University Law Review

Fordham Envtl LJ – Fordham Environmental Law Journal

Harv Envtl L Rev – Harvard Environmental Law Review

Harv L Rev – Harvard Law Review

Hous L Rev – Houston Law Review

J Legal Ed – Journal of Legal Education

JQR – Juta's Quarterly Review of South African Law

Loy La L Rev – Loyola of Los Angeles Law Review

Mercer L Rev – Mercer Law Review

Mich L Rev – Michigan Law Review

NYU Environmental Law Journal – New York University Environmental Law Journal

SAJHR – South African Journal on Human Rights

SALJ – South African Law Journal

SAPL – South African Public Law

Stan L Rev – Stanford Law Review

THRHR – Tydskrif vir die Hedendaagse Romeins-Hollandse Reg

TSAR – Tydskrif vir die Suid-Afrikaanse Reg

U Chi L Rev – University of Chicago Law Review

U Pa L Rev – University of Pennsylvania Law Review

Univ of Western Australia L Rev – University of Western Australia Law Review

Va L Rev – Virginia Law Review

Wake Forest L Rev – Wake Forest Law Review

Wm & Mary L Rev – William & Mary Law Review

Yale L J – Yale Law Journal

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